

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

BETTY ANN MARSEE,)
Administratrix of the Estate)
of MARVIN SEAN MARSEE,)
Deceased,)
Plaintiff,)
vs.) No. Civ-84-2777R
UNITED STATES TOBACCO CO.,)
a New Jersey corporation,)
Defendant.)

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
Thursday, June 5, 1986

A p p e a r a n c e s:

HON. DAVID L. RUSSELL,
U.S. District Judge, Presiding

GEORGE W. BRALY, Esquire
DANIA DESCHAMPS-BRALY, Esquire
Braly & Braly
217 North Mississippi
Ada, Oklahoma 74820
Appeared for Plaintiff.

TIMOTHY M. FINNEGAN, Esquire
Jacob, Medinger & Finnegan
1270 Avenue of the Americas
Rockefeller Center
New York, N.Y. 10020

and
ALSTON JENNINGS, Esquire
Wright, Lindsay & Jennings
2200 Worthen Bank Building
Little Rock, Arkansas 72201

Volume 22

and
ANDY COATS, Esquire
Crowe & Dunlevy
1800 Mid-America Tower
Oklahoma City, OK 73102
Appeared for Defendant.

Maynard E. Peterson, CSR
Acting Official Reporter

BE IT REMEMBERED, that on the 5th day of
June, 1986, the above matter coming on for jury trial
before the Honorable David L. Russell, United States
District Judge for the Western District of Oklahoma,
and the parties appearing in person and or by counsel
as hereinabove set forth, the following proceedings
were had:

AFTERNOON SESSION.

Thursday, June 5, 1986.

THE COURT: Be seated. Cross-examine.

MR. JENNINGS: Thank you.

CROSS EXAMINATION

BY MR. JENNINGS:

Q. Doctor Hunter, you are from New Orleans?

A. Yes.

Q. And have you lived most of your life in
Louisiana?

A. I have been in Louisiana for the last nine
years.

Q. Have you spent much time in Oklahoma?

1 A. This is my first time to Oklahoma.

2 Q. When were you at Ada?

3 A. I was never in Ada.

4 Q. Never had the occasion to travel from
5 Oklahoma City to Ada?

6 A. No.

7 Q. How large is Bogalusa?

8 A. The population is about 22,000.

9 Q. What was the principal business or industry
10 in Bogalusa?

11 A. Crown Zellerbach paper mill.

12 Q. Do a lot of lumber business?

13 A. Yes, yes.

14 Q. A lot of timber cutting, that sort of thing?

15 A. Yes.

16 Q. How many people were involved in the
17 studies? I think you limited your study to white
18 males?

19 A. When we talk about chewing and snuff, we
20 limit it to white males, because it's the largest
21 group that is using it.

22 Q. And the other groups, the females and the
23 Black males were not using enough of it to pay
24 attention to?

25 A. No, we studied them, we are keeping track of

1 them. We have data on them, but it takes up journal
2 space to report if the percentage is 2 percent or
3 less.

4 Q. I see. But, at any rate, the use was so
5 small you didn't think it was worth reporting?

6 A. That's correct.

7 Q. All right. And how many were in this study
8 on white males in 1976?

9 A. May I refer to my figure?

10 Q. Surely, please do.

11 A. I believe it was -- I believe it was on the
12 slide. My xerox copy, I can't read my xerox copy. I
13 believe it was over 900, but -- I would rather see
14 the slide, if I could.

15 Q. The slide I saw showed only the percentage,
16 I thought, but maybe I am mistaken. I would be happy
17 to have you see the slide if you would like.

18 A. Please, I can tell you how many were in 1976
19 cross-sectional study white males?

20 Q. Yes.

21 A. If I could see the slide.

22 Q. If Mr. Braly will help me, I would
23 appreciate it.

24 MR. BRALY: I would be glad to. Maybe we
25 can see it without diming the lights.

1 A. The slide before that, please.

2 MR. BRALY: You want the one before?

3 THE WITNESS: Yes.

4 A. This is the cross-sectional, the one you are
5 talking about?

6 Q. (BY MR. JENNINGS) Yes, ma'am.

7 A. 1976 there were 953 white males.

8 Q. All right. And in 1981?

9 A. 707.

10 Q. And it looks like that in every age there
11 were more tobacco chewers than there were snuff
12 dippers.

13 A. Yes.

14 Q. And that's in both the '76 and the '81?

15 A. Yes.

16 Q. And it looks like that the tobacco chewers
17 and snuff dippers consistently dropped off when they
18 approached 16 or 17 years of age; is that correct?

19 A. Yes.

20 Q. And the cigarette smokers continually
21 increased?

22 A. Yes.

23 Q. So there seemed to be a switching from
24 tobacco chewing or snuff-dipping to smoking.

25 A. We believe that that's what's happening. We

1 do have longitudinal data that we haven't analyzed
2 yet that takes us to age 24, but we have not analyzed
3 that yet.

4 Q. So you don't know what those figures show?

5 A. No.

6 Q. Now, if I could see the other slide for a
7 moment, I would like to ask you a few questions about
8 that. Perhaps you can see that, I have a copy here.
9 Am I reading correctly that with regard to, for
10 instance, the eight year olds that you had 48 people
11 that you studied again in '81?

12 A. This same 48, yes.

13 Q. Okay. And you had 49 nine year olds?

14 A. And they were 14 in '81, yes.

15 Q. I understand.

16 A. Yes.

17 Q. We are starting out, I am talking about now
18 in '76 --

19 A. Yes.

20 Q. -- these are the number of people that you
21 had in '76 that you studied again five years later
22 and their age in '76 was eight, you had 48, nine year
23 olds you had 49?

24 A. Yes, that's correct.

25 Q. Ten year olds you had 54?

1 A. Yes.

2 Q. 11 year olds you had 42?

3 A. Yes.

4 Q. 12 year olds you had 27?

5 A. Yes.

6 Q. Now, the next column which shows "initial,"
7 that shows numbers in parenthesis, does it not?

8 A. Yes.

9 Q. And you had a total of 30 tobacco chewers?

10 A. Initial among those people; is that correct?

11 A. Yes.

12 Q. And you had ten snuff dippers.

13 A. Yes.

14 Q. So you had three times as many chewers as
15 you did dippers.

16 A. Yes.

17 Q. And the same holds true relatively, although
18 not in the same percentage, but you had in each age
19 group that was taken five years later, you had more
20 chewers than you did dippers, didn't you?

21 A. Yes.

22 Q. Incidentally, let's look at the 42, 11 year
23 old dippers. Do you see that column?

24 A. Yes, in 1976?

25 Q. Right. You had two people in that age group

1 who dipped snuff?

2 A. Yes.

3 Q. And five years later, you had four people
4 from those 42 that were 11 back in '76 who dipped
5 snuff?

6 A. Yes.

7 Q. And how much of an increase is that?

8 A. That's a 200 percent increase.

9 Q. It is?

10 A. Yes.

11 Q. If you add three instead of two, how much of
12 an increase would that be?

13 A. From two to three?

14 Q. Yes.

15 A. A 50 percent increase.

16 Q. Two to three is a 50 percent increase?

17 A. Yes.

18 Q. And two to four is a hundred percent
19 increase, isn't it?

20 A. Yes.

21 Q. So it is not a 200 percent increase, it is a
22 hundred percent increase?

23 A. It must be a typographical error.

24 Q. Well, you made the same error on all of your
25 percentage of increases, didn't you?

1 A. Would you like to go through them one by
2 one?

3 Q. Pardon?

4 A. Would you like to go through them one by
5 one.

6 Q. If you like, it is fine with me. I don't
7 know that it is necessary. You go from 10 percent to
8 31 percent, that's a 210 percent increase, isn't it?

9 A. From -- excuse me. I don't do the
10 statistical analyses on these.

11 Q. I am not being critical Doctor Hunter at
12 all, I am just trying to be sure that the figures we
13 are looking at are correct?

14 A. Yes, I understand.

15 Q. And if you went from 10 percent to 10
16 percent, that would be a zero increase, wouldn't it?

17 A. It would be the same, yes.

18 Q. So if you are figuring, the figuring that is
19 done there is including the original hundred percent
20 instead of adding to it, isn't it, all your figures
21 on the right-hand column?

22 A. I don't understand your question.

23 Q. If you increased from five to 15, that is an
24 increase of 10, right?

25 A. If you -- I don't understand your question.

1 Q. Look at your first column there, the 48
2 eight year old. You had five in 1976, correct?

3 A. Yes.

4 Q. You had 15?

5 A. Uh-huh.

6 Q. That is an increase of ten?

7 A. Three times, if you multiply by three, that
8 is a 300 percent increase.

9 Q. No, I beg your pardon, it is ten more and
10 ten is twice as much as five, that makes it a 200
11 percent increase, doesn't it?

12 A. Once again, I'm not a statistician and we
13 have -- I have statisticians who handle that.

14 Q. I understand, but I am asking you now. You
15 understand what I am saying that ten is twice as big
16 as five?

17 A. Yes.

18 Q. So that is a 200 percent increase over five?

19 A. Right.

20 Q. Not a 300 percent?

21 A. But it went from five to 13.

22 Q. Yes, but it only increased by ten. Isn't
23 that is right?

24 That's all right. Now, do I understand that
25 your position with regard to this survey is that if I

1 know what's happening in Bogalusa, Louisiana, I know
2 what is happening in the world?

3 A. We are a national research and demonstration
4 center, and we are designated as a national research
5 and demonstration center, and very often our data are
6 compared to national surveys or other parts of the
7 country and, for example, in 1976, we were one of the
8 first to report that white girls were smoking more
9 than any other race gender group, and then a national
10 survey came along to confirm those findings that
11 white girls had surpassed white males in smoking at
12 that point.

13 Q. Let me ask you again. Are you taking the
14 position that if you know what is going on among 700
15 or 900 white males in Bogalusa, Louisiana, you know
16 what is going on in the whole wild world?

17 A. I would not take that position.

18 Q. Thank you, ma'am.

19 Would you tell me whether or not you think
20 over the world there is more tobacco chewing and more
21 snuff dipping?

22 MR. BRALY: Objection, Your Honor. Outside
23 the scope. I don't think I ever asked her a question
24 anything to do with that.

25 THE COURT: Overruled.

1 Q. (BY MR. JENNINGS) Do you have an opinion
2 about that?

3 A. I don't -- I don't follow what is going on
4 in the rest of the world. I only follow national
5 surveys of the United States, and I know there has
6 been a national survey on smokeless tobacco in the
7 United States, and I do know that Bogalusa does
8 reflect what's happened in this national probability
9 survey.

10 Q. Do you think that the number of people
11 dipping and smoking in Bogalusa would be at all of
12 interest to you or use to you in what's happened in
13 Oklahoma or Arkansas?

14 A. There's a study done by Doctor E. D. Glover,
15 which is a national probability sample, and he did
16 collect data in Oklahoma and the data from Bogalusa
17 does reflect those data.

18 Q. Do they have the same circumstances existing
19 in Oklahoma that you do in Bogalusa?

20 A. What circumstances are you referring to?

21 Q. Circumstances with regard to use of
22 tobacco. I thought that was what we were talking
23 about.

24 A. Cigarettes and smokeless tobacco?

25 Q. Yes.

1 A. You put them both together. Well, I can
2 tell you about the national probability sample that
3 was done by Doctor Glover on smokeless tobacco, and,
4 yes, it reflects what was happening in Bogalusa.

5 Q. National is the same as what is happening in
6 Bogalusa?

7 A. That's right.

8 Q. Why were the young people increasing their
9 use of tobacco?

10 A. Why?

11 Q. Yes.

12 A. Why were they increasing their use of
13 smokeless tobacco?

14 Q. Any kind.

15 A. I have no idea. It appears that smokeless
16 tobacco is a fad now. I really have no idea why.

17 Q. Have you studied that?

18 A. No.

19 Q. Have you studied what the influence of the
20 family has been on the use of tobacco by young
21 people?

22 A. We have studied the influence of family,
23 friends and advertising on cigarette smoking. We
24 have not studied the influence of family, friends and
25 advertising on smokeless tobacco.

1 Q. So you don't know what effect family
2 influence has had?

3 A. On smokeless tobacco?

4 Q. Yes, ma'am.

5 A. No.

6 Q. You don't know what influence friends have
7 had?

8 A. I can tell you a little bit the influence of
9 friends on smokeless tobacco.

10 Q. Tell me about that.

11 A. I -- as compared to cigarette smoking, we
12 find in Bogalusa that those children who do not smoke
13 cigarettes pick friends who don't smoke cigarettes,
14 and whereas when it comes to smokeless tobacco, it is
15 a much more diffuse situation, that even if a child
16 does not use smokeless, they are likely to have a
17 friend who uses smokeless.

18 THE COURT: Excuse me, Mr. Jennings.

19 Mr. Jennings, are you through with that,
20 with the --

21 MR. JENNINGS: Yes, I am.

22 THE COURT: Why don't you turn that off, Mr.
23 Braly.

24 MR. BRALY: Sure.

25 THE COURT: Go ahead.

1 Q. (BY MR. JENNINGS) How do you classify
2 people as users or nonusers of the various types of
3 tobacco?

4 A. For cigarette smoking, we classify them
5 according to five behavioral outcomes. A child who
6 has never smoked a cigarette, a child who smokes at
7 least once a week, which is a common definition of a
8 smoker for children, a child who has smoked a few
9 times to see what it was like and quit, and a child
10 who was a regular cigarette smoker and then quit and
11 a regular smoker, a child who smokes at least one
12 cigarette a week -- an experiment, a child who smokes
13 less than one cigarette a week. For chewing tobacco
14 and snuff, we simply ask them, "Do you use chewing
15 tobacco, do you use snuff."

16 Q. You don't ask them anything about quantity?

17 A. No.

18 Q. When they had last used it?

19 A. No.

20 Q. Or any questions of that nature?

21 A. No.

22 Q. If the answer to the question "Do you use
23 it" is "yes," then that gets put down as a user?

24 A. That's right.

25 Q. If the answer "Do you use it" is "no" that

1 is a nonuser?

2 A. That's right.

3 Q. What about people who have used it but have
4 stopped?

5 A. That hasn't been a focus of our past
6 studies.

7 Q. So you haven't asked that at all?

8 A. No.

9 Q. You have no idea of the amount of use in any
10 of these people?

11 A. No.

12 MR. JENNINGS: I believe that's all.

13 THE COURT: Anything further?

14 MR. BRALY: Just a few questions, Your
15 Honor.

16 First, Your Honor, because of the immediacy
17 of the lunch break, I did not offer but do now offer
18 what has been marked as Plaintiff's Exhibit 73-B.

19 THE COURT: Is this --

20 MR. BRALY: -- into evidence.

21 THE COURT: Objection will be sustained --

22 MR. JENNINGS: Thank you.

23 THE COURT: -- 73-B, based on my prior
24 ruling.

25 REDIRECT EXAMINATION

1 BY MR. BRALY:

2 Q. Doctor Hunter, look at these numbers right
3 here, for the nine year olds, 1976, it that is 4
4 percent of them?

5 A. Yes.

6 Q. Five years later there is 33 percent of
7 them?

8 A. Yes.

9 Q. And if my memory serves me correctly, if you
10 divide four into 33, it is about eight times?

11 A. Yes.

12 Q. About eight times as many snuff dippers five
13 years later in that age bracket?

14 A. Yes.

15 Q. Irrespective of what the percentage are,
16 there are eight times as many?

17 A. Yes.

18 Q. Okay. Is that what you were trying to get
19 across with those numbers, percentages?

20 A. That's right.

21 MR. BRALY: I don't have anything further,
22 Your Honor.

23 THE COURT: Anything further?

24 RECROSS EXAMINATION

25 Q. (BY MR. JENNINGS) Doctor, two from 16 is

1 14; is that correct?

2 A. Two from 16, yes.

3 Q. And 14 is 7 times as many as two?

4 A. Yes.

5 MR. JENNINGS: Thank you.

6 THE COURT: You may step down. You are
7 excused.

8 MS. DESCHAMPS-BRALY: Your Honor, the
9 plaintiff would call Calvin Smith.

10 CALVIN SMITH,
11 called as a witness on behalf of the plaintiff, being
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MS. DESCHAMPS-BRALY:

15 Q. Would you state your full name, please.

16 A. My name is Charles Calvin Smith.

17 Q. And where do you live, Calvin?

18 A. I live in [DELETED]

19 Q. Have you ever testified before?

20 A. No, ma'am.

21 Q. If you get nervous or you don't understand
22 anything I say to you, you just ask me again, because
23 it happens to all of us.

24 A. Okay.

25 Q. Okay? Do you know my husband or myself?

1 A. Yes, I do.

2 Q. How long have you known us?

3 A. Four years.

4 Q. And how did you come to get to know us?

5 A. I was having trouble with my gasoline
6 supplier at one of my stores and needed counsel, and
7 I came and spoke with Mr. Braly.

8 Q. And are you married?

9 A. Yes, I am.

10 Q. Do you have children?

11 A. I have two children.

12 Q. And I believe you have a little boy and a
13 little girl?

14 A. I have a daughter that is 13 and a son
15 that's 2-1/2.

16 Q. Do your little boy and our little boy play
17 together?

18 A. No, ma'am.

19 Q. Calvin, what do you do for a living?

20 A. I'm the president and manager of Double S
21 Convenience Stores, Incorporated.

22 Q. And how many stores do you have?

23 A. I have three.

24 Q. Could you tell us what kind of stores those
25 are basically?

1 A. Retail gasoline and groceries, deli items.

2 Q. Is that normally what some people refer to
3 as Beep and Buy stores?

4 Q. Now, do you have one of those stores in
5 Stonewall, Oklahoma?

6 A. Yes, I do.

7 Q. Could you tell the Court and the jury a
8 little bit about what type of community Stonewall is?

9 A. Stonewall is a small community about 600
10 people, primarily oil field related, and some
11 agricultural, just small --

12 Q. Do you have any idea about how many people
13 live there?

14 A. Well, I think the population at the last
15 census was like 630, and there's about 400 children
16 going to school there.

17 Q. Where is your store in relation to the grade
18 and high school in Stonewall, Oklahoma?

19 A. I'm four blocks north of the grade and high
20 school.

21 Q. Do you sell U.S. Tobacco Company snuff
22 products in your stores?

23 A. Yes, I do.

24 Q. Can you tell us what brands you sell?

25 A. I sell Copenhagen, Skoal, Skoal Straight

1 Cut, Skoal Long Cut, Skoal Bandits, Skoal Bandit
2 Mints, and I sell Kodiak, Hawkens, --

3 Q. Now, Calvin, have you ever been visited at
4 your store by any of the representatives of the U.S.
5 Tobacco Company?

6 A. Yes, I have -- normally I have a
7 representative through at least once a year, anywhere
8 from nine months to a year.

9 Q. Have you ever been told by anyone of those
10 representatives that the company did not want the
11 product being sold to minors?

12 A. No, ma'am.

13 Q. Does the United States Tobacco Company ever
14 run specials where they have the distributors give
15 you samples to be given away as promotional gimmicks?

16 A. Yes, ma'am.

17 Q. Have you ever been advised by any of UTS's
18 representatives that they do not want those samples
19 being given away to minors?

20 A. No, ma'am.

21 MS. DESCHAMPS-BRALY: I have no further
22 questions.

23 CROSS EXAMINATION

24 BY MR. JENNINGS:

25 Q. Kodiak and Hawkens are not products of U.S.

1 Tobacco Company, are they?

2 A. No, sir.

3 Q. Who makes those products?

4 A. I believe one of them is made by Lorillard,
5 and I am not for sure who makes the other one.

6 Q. Are they both snuff products?

7 A. Yes, sir.

8 Q. Do you sell any other snuff products?

9 A. I sell Garrett Sweet, Garrett Honest and
10 Garrett White Label.

11 Q. None of those are made by U.S. Tobacco
12 Company, are they?

13 A. No, sir.

14 Q. Do you sell chewing tobacco?

15 A. Yes, sir.

16 Q. What is the source of your supply of
17 tobacco?

18 A. I get -- the majority of my tobacco is from
19 Indian Nation Wholesale out of Durant, Oklahoma. I
20 also pick up some off of Mac's Wholesale in Ada, and
21 I buy some from Affiliated Foods out of Tulsa.

22 Q. All of these wholesalers are independent
23 wholesalers, are they? I mean they are not connected
24 with the manufacturer of the tobacco, are they?

25 A. Not to my knowledge.

1 Q. So you are supplied by an independent
2 wholesaler?

3 A. Yes.

4 Q. You say that Mr. Braly has acted as your
5 attorney?

6 A. Yes, sir.

7 Q. In your store do you sell tobacco products
8 to people under 18 years of age?

9 A. No, sir.

10 Q. Do you know what the policy of United States
11 Tobacco is with regard to selling to people under 18
12 years of age?

13 A. I have never heard of the policy, sir.

14 Q. You don't know whether they have a policy or
15 not?

16 A. No, sir.

17 Q. Or if they do have, what it is?

18 A. No, sir.

19 Q. You just don't know?

20 A. It's never been stated.

21 MR. JENNINGS: I believe that's all.

22 THE COURT: Anything further, Mr. Braly or
23 Ms. Braly?

24 MS. DESCHAMPS-BRALY: Just a couple of
25 questions, Your Honor.

REDIRECT EXAMINATION

BY MS. DESCHAMPS-BRALY:

Q. Calvin, have you ever received any type of promotional items at all directly from the United States Tobacco Company representatives?

MR. JENNINGS: If the Court please, this is not redirect. That is not redirect.

MS. DESCHAMPS-BRALY: I beg your pardon, Your Honor. He was inquiring if all the materials he received were from the distributor, and this goes to rebut what they are saying. This is redirect.

MR. JENNINGS: I don't know what I implied, but I didn't ask any questions --

THE COURT: He didn't ask any questions about materials from suppliers from anyone. Sustained. Go ahead.

Q. (BY MS. DESCHAMPS-BRALY) Calvin, have the U.S. Tobacco Company representatives ever come to see you directly at the store?

A. Yes, they have.

Q. Have they ever given you instructions not to distribute to minors?

A. No.

MR. JENNINGS: That's repetitious, Your Honor.

1 THE COURT: Overruled. Overruled, go ahead.

2 Q. (BY MS. DESCHAMPS-BRALY) When they had come
3 to your store, what have they been driving?

4 MR. JENNINGS: If the Court please, in the
5 first place I don't know how that is relevant, and
6 certainly it is not redirect examination.

7 THE COURT: Sustained.

8 MS. DESCHAMPS-BRALY: No further questions.

9 THE COURT: Anything further?

10 MR. JENNINGS: Nothing further.

11 THE COURT: You may step down. You are
12 excused.

13 MS. DESCHAMPS-BRALY: Your Honor, the
14 plaintiff would call Kim Henley.

15 KIM HENLEY,
16 called as a witness on behalf of the plaintiff, being
17 first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MS. DESCHAMPS-BRALY:

20 Q. Would you state your name for the record,
21 please.

22 A. Yes, Kim Henley.

23 Q. And, Kim, where do you live?

24 A. [DELETED]

25 Q. Have you ever been in a court of law before?

1 A. Just to bring documents to you.

2 Q. Do you know me?

3 A. Yes, I do.

4 Q. And how do you know me?

5 A. I work for you and Mr. Braly.

6 Q. How long have you been working for us?

7 A. Three years.

8 Q. Have you been working full-time during that
9 whole period?

10 A. No, I have not. I worked part-time and
11 attend East Central University, and things were
12 hectic. I took out this semester to help with the
13 case and work full-time, and after this is over, this
14 fall I am going to East Central and work for you
15 part-time.

16 Q. You plan on working for us after you
17 graduate from college?

18 A. Yes, I do.

19 Q. Was Mrs. Marsee a client of Braly and Braly
20 when you first came to work for us?

21 A. No, she was not.

22 Q. Kim, do you know what the World Champion
23 Quarter Horse Show is?

24 A. Yes, I do.

25 Q. Would you tell the Court and the jury in

1 case they are not aware of what that show is all
2 about.

3 A. It is a show that is held annually to
4 determine the Superhorse of the Year award which is
5 given out that year.

6 Q. Have you ever attended that show?

7 A. Yes, I have.

8 Q. How many times have you gone?

9 A. Approximately the past six or seven years.

10 Q. Without missing a one?

11 A. Yes.

12 MS. DESCHAMPS-BRALY: Your Honor, may I
13 approach the witness at this time.

14 THE COURT: Yes.

15 Q. (BY MS. DESCHAMPS-BRALY) Kim, let me show
16 you what has been marked as Plaintiff's Trial Exhibit
17 48-H. Can you tell us what that is?

18 A. It is a booth at the World Quarter Horse
19 Show in the exhibit hall.

20 Q. Did you take that picture yourself?

21 A. No, I did not.

22 Q. Who took the picture?

23 A. Brett Wright. I was present with him at the
24 time it was taken.

25 Q. When and where was it taken?

1 A. In Oklahoma City, Oklahoma, fairgrounds,
2 November 10, 1984, the Saturday before we filed Sean
3 Marsee's lawsuit.

4 Q. And is it an accurate depiction of the booth
5 as the picture was taken on that day?

6 A. Yes, it is.

7 Q. Kim, let me show you what has been marked as
8 Plaintiff's Trial Exhibit 48-I.

9 A. Yes.

10 Q. Could you tell us what that picture is?

11 A. This is another picture of the World Quarter
12 Horse Show, the booth in the exhibit hall, taken
13 November 17, 1984, the Saturday after the lawsuit was
14 filed.

15 Q. Did you take that picture yourself?

16 A. Yes, I did.

17 Q. Are you a little bit nervous?

18 A. Very.

19 Q. Slow down, because I know you are talking a
20 little bit faster than you normally do.

21 Kim, I ask you to look at the front of that
22 picture that has been marked --

23 MS. DESCHAMPS-BRALY: Oh, Your Honor, at
24 this point I would move these pictures into admission
25 into evidence at this point, 48-H and 48-I.

1 MR. JENNINGS: If the Court please, we have
2 no objection. We waived the rule on this witness
3 with the understanding that that testimony would be
4 limited to identifying these two exhibits, and if
5 that's all her testimony is, we could have stipulated
6 to it.

7 THE COURT: All right. Plaintiff's 48-H and
8 48-I will be admitted.

9 MS. DESCHAMPS-BRALY: Thank you.

10 Q. (BY MS. DESCHAMPS-BRALY) Kim, would you
11 look at the front of the picture that is labeled
12 48-I.

13 A. Yes.

14 Q. Would you read what the sign says on the
15 front of the picture?

16 A. "Free samples. Must be 18 years old. No
17 exceptions."

18 Q. Would you now look at the previous exhibit,
19 48-H, which was taken on the weekend before the
20 Marsee lawsuit was filed and tell the jury is there
21 any such sign on the front of the table or the
22 booth at that time?

23 A. No, sir, there is not.

24 MS. DESCHAMPS-BRALY: Your Honor, I would
25 ask to publish those exhibits to the jury at this

1 time.

2 THE COURT: Go ahead.

3 THE COURT: Anything further?

4 MS. DESCHAMPS-BRALY: I have no further
5 questions, Your Honor.

6 THE COURT: Any questions, Mr. Jennings?

7 MR. JENNINGS: I have no questions.

8 THE COURT: You may step down. You are
9 excused.

10 THE WITNESS: Thank you.

11 THE COURT: Call your next witness.

12 MS. DESCHAMPS-BRALY: Your Honor, at this
13 time we will call John Zotas.

14 JOHN ZOTAS,
15 called as a witness on behalf of the plaintiff, being
16 first duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MS. DESCHAMPS-BRALY:

19 Q. Mr. Zotas, would you state your full name,
20 please.

21 A. John Alexander Zotas.

22 Q. And where do you live?

23 A. Dallas, Texas.

24 Q. How are you employed?

25 A. I'm self-employed, construction.

1 Q. Mr. Zotas, have you ever met me before
2 today?

3 A. No, today.

4 Q. And do you know George Braly?

5 A. Yes.

6 Q. Where have you met him?

7 A. Dallas, Texas.

8 Q. And how long ago was that?

9 A. An estimate of a month.

10 Q. Have you ever seen him besides on that
11 occasion?

12 A. This morning.

13 Q. Mr. Zotas, have you ever used snuff
14 yourself?

15 A. Yes.

16 Q. When did you start using it?

17 A. Do you mean partially or do you mean
18 full-time? Can you clarify the question?

19 Q. How old were you when you used it the first
20 time?

21 A. 13.

22 Q. Let me ask you this. How old are you now?

23 A. 26.

24 Q. At any time before you were 18 years of age,
25 did you ever receive any free samples from the United

1 States Tobacco Company?

2 A. Yes.

3 Q. Can you tell me how old you were when that
4 happened?

5 A. 13 and 14, right in that area. I had a
6 birthday in the middle.

7 Q. And can you tell me how you obtained those
8 samples?

9 A. Through the mail.

10 Q. What did you do?

11 A. I filled out a coupon in an Outdoor Life or
12 Field & Stream magazine, one of the two.

13 Q. All right. And what did you get back in the
14 mail?

15 A. I received a canister, I guess a mailing
16 canister, about the size of five or six cans of snuff
17 with four cans of snuff within the canister.

18 Q. What kinds of snuff were in the packets?

19 A. Copenhagen, Skoal, Happy Days Mint and
20 Raspberry.

21 Q. Mr. Zotas, do you know Walt Garrison?

22 A. I met him last spring.

23 Q. Have you and Mr. Garrison ever discussed the
24 subject of snuff-dipping?

25 A. As -- Can you ask the question again, I

1 guess, another way?

2 Q. All right. Have you and Mr. Garrison ever
3 talked about your brother and snuff-dipping?

4 A. Yes.

5 Q. What did Mr. Garrison tell you when you told
6 us the circumstances of that conversation?

7 A. This takes us back to South Padre Island in
8 the spring of '85, during the spring break
9 festivities in Padre Island. My brother had --
10 thought he had a problem with the inside of his mouth
11 due to dipping snuff.

12 Q. Was your brother in any way associated with
13 U.S. Tobacco Company?

14 A. Yes. He was in their college representative
15 program.

16 Q. Okay. Would you go on, please.

17 A. He voiced his concern to me and -- as well
18 as his adviser within the Skoal family, and I assume
19 that his adviser told Mr. Garrison to come to Padre
20 Island and see Pete. I don't know if he was going
21 down or not.

22 Q. How did you come to see Mr. Garrison
23 yourself?

24 A. Came to me.

25 Q. All right. When was that meeting?

1 A. In a bar and grill called the Sand Hole.

2 Q. And what was the subject of the conversation
3 between you and Mr. Garrison?

4 A. Mainly that if there was a problem, that the
5 U. S. Tobacco would send him to the best doctors.
6 They were willing to take him at that time anywhere
7 he wanted to go to make sure that he was comfortable
8 with -- that everything that could be done would be
9 done.

10 Q. Did he tell you anything else?

11 A. He asked me not to make this a big thing.
12 He and Larry Glass wanted us to keep it in the
13 family -- not in the family, so to speak, but low
14 profile.

15 Q. You are not using exact quotes, are you?

16 A. No.

17 Q. All right. So you are repeating the
18 conversation to the best of your ability?

19 A. Right.

20 Q. As to what the gist was, and the gist was to
21 be quiet?

22 A. There is no need to tell the world about
23 this.

24 MS. DESCHAMPS-BRALY: I have no further
25 questions.

CROSS EXAMINATION

BY MR. JENNINGS:

Q. What did Mr. Garrison say to you?

A. Exactly verbatim I really couldn't tell you exactly. He was very helpful, in that he wanted whatever could be done to be done, and he said, "We will do what we can do."

Q. He was an employee of U.S. Tobacco Company, wasn't he?

A. Yes, sir.

Q. Now, Mr. Garrison was telling you that he wanted to do anything he knew could be done to be done; is that correct?

A. He sure didn't.

Q. All right. Now, you can't tell this jury what Mr. Garrison said that you interpreted as meaning keep it quiet, can you?

A. I can tell this jury that Larry Glass, who is --

Q. No.

A. I can do that.

Q. Excuse me, Mr. Zotas.

A. Speaking for Mr. Garrison.

Q. Listen to my question.

A. Okay. Excuse me. I didn't understand your

1 question.

2 Q. What did Mr. Garrison say?

3 A. Verbatim?

4 Q. Yes.

5 A. I really couldn't tell you verbatim.

6 MR. JENNINGS: No further questions, Your
7 Honor.

8 REDIRECT EXAMINATION

9 BY MS. DESCHAMPS-BRALY:

10 Q. Mr. Zotas, can you tell me verbatim what Mr.
11 Alston Jennings just said to you right now?

12 A. I sure can't.

13 Q. Can you tell me again the gist of what Mr.
14 Garrison said to you about keeping the matter quiet?

15 MR. JENNINGS: If the Court please,
16 repetitious. It is not redirect.

17 THE COURT: Sustained.

18 MS. DESCHAMPS-BRALY: No further questions.

19 THE COURT: You may step down. You are
20 excused.

21 Call your next witness.

22 MR. BRALY: We will call Louis Bantle by
23 videotape, Your Honor, unless they want to produce
24 him.

25 THE COURT: Go ahead.

1 THE COURT: Counsel, come up just a moment.

2 (The following proceedings were had AT THE SIDE
3 BAR.)

4 THE COURT: Are you out of a witness?

5 MR. BRALY: Yes, we are out of live
6 witnesses.

7 THE COURT: I have gone through some of Mr.
8 Bantle's deposition. There are a lot of objections
9 in there. I think it would take frankly a
10 substantial time to go through and rule on those
11 objections.

12 MS. DESCHAMPS-BRALY: We have one more live
13 witness. Unfortunately plane connections didn't work
14 out, and we had another one that his wife is
15 expecting and thought she would have her baby by now,
16 so he can't come down until later, so do you
17 suppose --

18 THE COURT: Do you have any other
19 depositions that are not so rife with objections that
20 we could read? There's an awful lot of that. I
21 don't know how many of the defendant's objections are
22 still viable or that you want to continue to pursue,
23 but there's an awful lot of them, and I think we are
24 going to spend the afternoon up and down is my
25 concern, and I think there is a better way of doing

1 it.

2 What I really had hoped to do, frankly, on
3 Bantle was to put him off until Monday and let me
4 spend the weekend reading it and going through all
5 the objections and responses and then giving you
6 something so that you could play it without all the
7 interruptions.

8 MR. BRALY: Your Honor, we will have to do
9 that because -- Judge, the only other depositions we
10 have we are going to read, Your Honor, and they won't
11 take 30 minutes to do, I don't think.

12 MS. DESCHAMPS-BRALY: We have some witnesses
13 that are flying in on Monday that that's the only day
14 that they can be here, one being the expectant father
15 and the other one the one with the plane connections
16 and so forth, the plane schedules got messed up.

17 THE COURT: Tomorrow you have got --

18 MR. BRALY: We have got a marketing guy
19 coming tomorrow.

20 THE COURT: Well, --

21 MS. DESCHAMPS-BRALY: Plus some other live
22 witnesses that are going to be here tomorrow
23 afternoon.

24 THE COURT: Why don't we go ahead? Why
25 don't you go ahead and read the depositions that you

1 have got? Who are they of?

2 MR. BRALY: The one of Shep Messing, I
3 suppose we can go.

4 MR. BRALY: We can go through the Shep
5 Messing deposition here. I think we have got it
6 here.

7 THE COURT: I hate to do this, but I think
8 it would almost be faster for me, even this
9 afternoon, to go through that deposition than to do
10 it here before the jury. There are just so many
11 objections in there. It is a 170-page deposition. I
12 think we will end up spending two days on that if I
13 don't go through this and rule on it. I don't think
14 it would be helpful to you. Let's go ahead and do
15 what we can. We may recess.

16 MR. BRALY: Judge, can I be heard one moment
17 on this exhibit?

18 THE COURT: Sure.

19 MR. BRALY: The basis this is being
20 offered, it is a government publication. This is the
21 official publication of the United States Department
22 of Health and Human Services. I don't know whether I
23 called that to the Court's attention in connection
24 with offering it.

25 THE COURT: What rule are you offering it

1 in?

2 MR. BRALY: It comes under the public
3 records.

4 MS. DESCHAMPS-BRALY: Exception to the
5 hearsay rule.

6 Your Honor, if you will excuse me, I will go
7 check and see if that deposition is here.

8 THE COURT: (Nodding yes).

9 What do you say?

10 MR. FINNEGAN: If the Court please, that
11 rule lets something in if it is a result of a
12 fact-finding by the government, as I understand the
13 rule. This here is a conference which was under the
14 auspices of the NIH; however, the participants were
15 not governmental employees, and we have brought to
16 the Court's attention in which there was a National
17 Consensus Conference on DES, which fits almost on all
18 fours with this conference, and it was not allowable
19 under that exception for governmental reports. This
20 is not a governmental report of a fact-finding.

21 MR. BRALY: That case is not controlling
22 authority, Your Honor. The reasons why that document
23 was excluded in that case had to do with the fact
24 that the plaintiff in the case had participated in
25 the conference. There is no such situation involved

1 in this particular document.

2 THE COURT: Let me look at that, and I will
3 hold 73-B in abeyance.

4 MR. JENNINGS: Thank you.

5 THE COURT: Let me deal with 196, 197 and
6 198. I think there is relevant material in all of
7 these that meant, there is a lot in some of these
8 does not seem relevant at all. I don't know what you
9 are offering, what you consider relevant. What I am
10 suggesting is that you might make a notation somehow
11 on a copy as to what you think are relevant, and we
12 can either excise it, for instance, this Warwick
13 advertising since 1972. Is that a product of U.S.
14 Tobacco Company, Warwick?

15 MS. DESCHAMPS-BRALY: It is advertising.

16 MR. FINNEGAN: He is the advertising agent.

17 MR. BRALY: That was their
18 advertising agency.

19 THE COURT: I thought that was a different
20 product.

21 MS. DESCHAMPS-BRALY: No.

22 THE COURT: Also, these two documents, they
23 appear virtually the same.

24 MR. BRALY: They appear close.

25 THE COURT: Is there anything in one that is

1 not in the other that is relevant? That's 196 and
2 197.

3 MR. BRALY: Yes. It may be that this one
4 can drop out, Your Honor. I think all this stuff
5 that I am interested in, if I look at them
6 overnight --

7 THE COURT: Why don't you do that, and then
8 on 198, if you would just look at that and see what
9 it is that is relevant that you wish to offer,
10 perhaps we can exclude --

11 MR. BRALY: Well, I don't want to exclude
12 any, because I thought there might be some offsetting
13 matters in the document that I might want to insist
14 be in the document, and I don't want to --

15 THE COURT: They probably don't want
16 anything in there. Do you want the document --

17 MR. FINNEGAN: We don't want the document,
18 anything there. This a task force. You know
19 companies have lots of groups of people that meet,
20 and the man testified that he doesn't recall that. I
21 don't think any of that stuff is relevant.

22 THE COURT: Well, go ahead and do that on
23 198, what you think is relevant, --

24 MR. BRALY: Okay.

25 THE COURT: -- and do you have copies?

1 MR. BRALY: Let me borrow them.

2 THE COURT: All right. That will be fine.

3 MS. DESCHAMPS-BRALY: Your Honor, the two
4 things that we got that we could get out of the way
5 this afternoon would be some of the portions of Shep
6 Messing's deposition that we can read, -- we don't
7 have a video available -- and then we can read the
8 Lazarus stipulation that we entered into into the
9 record, but we are talking about, you know, two or
10 three minutes there.

11 MR. BRALY: We have got a couple of
12 documents that we want to publish to the jury, that
13 we can read and publish to the jury.

14 MS. DESCHAMPS-BRALY: We can either recess
15 and go through the objections and start running on a
16 day -- I don't know what else to do at this point,
17 because we were just planning on depositions.

18 MR. FINNEGAN: If the Court please, I don't
19 think whether they have the Shep Messing material, we
20 were prepared to go with Bantle.

21 THE COURT: Do you have any problem with my
22 proposal?

23 MR. JENNINGS: No, Your Honor.

24 MR. FINNEGAN: No. As a matter of fact, we
25 agree that that would be a good way to handle it.

1 MS. DESCHAMPS-BRALY: If Your Honor would
2 like to recess now, that's fine, too.

3 THE COURT: No, I'd just as soon go ahead
4 with this, this also, what you have got.

5 MS. DESCHAMPS-BRALY: They are saying they
6 are not prepared.

7 MR. FINNEGAN: No, I am not sure. I will
8 have to go over and check back. We brought materials
9 over.

10 THE COURT: Who is that?

11 MR. FINNEGAN: Soccer player that does
12 advertising in seminars for them.

13 THE COURT: Do you have any problem on the
14 TV commercials?

15 MR. FINNEGAN: Well, I would think we are
16 going to have to find out where the TV commercials
17 were played. If we are talking about a TV commercial
18 that was aired in the northeast, but nationally or
19 not in Oklahoma, I would think it would come within
20 the Court's ruling that such advertising never
21 touched the decedent. I assume that the Court's
22 ruling is anything that was national he had an
23 opportunity to see. I am not sure.

24 THE COURT: Do you know --

25 MS. DESCHAMPS-BRALY: They are all national

1 advertising, because we received them in response to
2 the interrogatory. They told us they cannot
3 differentiate because they were national
4 advertising.

5 MR. FINNEGAN: If that's what it is, that's
6 what it is.

7 THE COURT: Let's do that. That's a good
8 idea.

9 MS. DESCHAMPS-BRALY: I will see where they
10 are.

11 THE COURT: Okay.

12 (The following proceedings were had IN OPEN
13 COURT.)

14 MS. DESCHAMPS-BRALY: Your Honor, they have
15 gone after him, so it will be just a few moments,
16 minutes, moments was kind of short.

17 THE COURT: We need to take a recess, or is
18 there something else you want to do?

19 MS. DESCHAMPS-BRALY: I think that would be
20 a great idea.

21 MR. BRALY: Either way, we have got a couple
22 of documents we want to publish to the jury, but I am
23 sure they are going to want to look at them first.
24 We can do that at the recess.

25 THE COURT: How about the Messing

1 deposition? Do you all have that?

2 MR. JENNINGS: We have that.

3 MR. FINNEGAN: We are told they are over
4 here. We will have to dig it out.

5 THE COURT: Let's take a 15-minute recess
6 now. There is something strange going on, ladies and
7 gentlemen. When the Court and both sides agree on
8 something, there is something wrong. (Laughter). We
9 are all agreeing on a procedure for this afternoon.

10 I think it will be helpful to everyone, and
11 we will take a recess now for about 15 minutes, and
12 my usual admonitions to you.

13 Please remain seated while the jury exits.

14 Court will be in recess.

15 (A brief recess was here had.)

16 (The following proceedings were had out of the
17 presence and hearing of the jury.)

18 THE COURT: Be seated. I glanced through
19 this Shep Messing deposition. I understand there is
20 an objection to the deposition generally.

21 MR. FINNEGAN: Yes, Your Honor. This
22 deposition of Mr. Messing relates primarily to the
23 college soccer clinic program that the company
24 sponsored. Mr. Messing was the one that put on those
25 clinics on college campuses. It also relates to

1 soccer clinics on military bases, and there is really
2 very limited testimony about clinics and the
3 possibility that youngsters could have entered those
4 clinics, but the thrust of this deposition is really
5 going to this soccer clinic program that was
6 conducted on college campuses and military
7 installations, and we don't believe that this really
8 has anything to do with the issues in this lawsuit.

9 THE COURT: Mr. Braly.

10 MR. BRALY: Your Honor, the significant
11 portion of his deposition, as far as we are
12 concerned, involves a couple of principal points. I
13 believe Mr. Garrison testified at one point in his
14 deposition that they didn't let anybody advertise
15 snuff that didn't use snuff. This witness testified
16 that he went to work as a college rep two or three
17 years before he ever started dipping, not
18 particularly important, but it is the important point
19 in the deposition, the testimony at the end of the
20 deposition about the number of people under the age
21 of 17 who are soccer players.

22 There is considerable evidence in the
23 published evidence, in addition to his testimony,
24 that some 7 million out of the 8 million soccer
25 players in the United States are under the age of 18.

1 Yet the tobacco company uses a star soccer player to
2 advertise snuff and has been since the 1970's. And
3 we think the jury needs to appreciate those facts
4 before they see the videotape ads of soccer players.

5 THE COURT: Well, was there any evidence
6 that he was putting on clinics for persons other than
7 college-age students?

8 MR. BRALY: Pardon?

9 THE COURT: Is there any evidence he was
10 putting on clinics for persons other than college-age
11 students?

12 MR. BRALY: Judge, what was happening was
13 that they have him appear at a college soccer game
14 and they invite all the kids out of the stand to come
15 down and shoot goals against them at the half-time.

16 MR. FINNEGAN: If the Court please, I
17 believe that the testimony is that he was putting on
18 clinics on college campuses and if there were any
19 clinics which involved young kids, he changed his
20 clothes. He had nothing, no identification with
21 Skoal at that time.

22 He was putting on clinics for various
23 products. I think he advertised Puma shoes. He was
24 advertising various other products, Your Honor, but
25 the clinics that this man was putting on were clinics

1 that were held on college campuses and on military
2 installations.

3 MR. BRALY: Judge, as far as we are
4 concerned, the single most important piece of
5 information out of that is his acknowledgment that
6 millions of kids, I mean as he put it, there are more
7 kids playing soccer in grade school and junior high
8 than playing football and little league baseball put
9 together, and yet they are using this man for running
10 national ads for snuff. There are not any adults
11 except in the professional soccer and college soccer
12 which, you know, play soccer. The rest of them are
13 kids.

14 MS. DESCHAMPS-BRALY: That's towards the end
15 of the deposition, Your Honor. We really have no
16 objection to cutting most of the deposition as long
17 as those relevant portions are left in.

18 THE COURT: I would think that would be
19 relevant, but most of the deposition I read through,
20 and it just did not strike me as relevant, but --

21 MR. BRALY: Your Honor, it is only 21 pages
22 long. We can spend more time --

23 THE COURT: I agree. What he says at
24 Page -- I see on Page 24, asked the question: "Isn't
25 it true that there are approximately 5 million boys

1 and 2 million girls that are under the age of 18 that
2 are playing soccer?"

3 And he answers: "I can't say for sure, but
4 I would think so."

5 That is --

6 MR. BRALY: That's what it ultimately leads
7 up to.

8 THE COURT: Well, do you object to that
9 portion being read?

10 MR. FINNEGAN: I don't, Your Honor.

11 MR. JENNINGS: I don't know what it has got
12 to do with anything, but I don't object to it.

13 MR. FINNEGAN: We don't object to it, if
14 they want to read those three or four pages.

15 THE COURT: Well, they are going to need to
16 see who it is.

17 MR. BRALY: The jury -- it's kind of hard
18 to judge the credibility of the witness in that kind
19 of absolute vacuum, Your Honor, but we are willing to
20 try.

21 THE COURT: Is this a videotape?

22 MR. BRALY: No, we are just going to read
23 it, Your Honor. We can just get through it and mark
24 it and do anything you want to.

25 THE COURT: What do you think about just a

1 stipulation that Shep Messing does promotionals for
2 U.S. Tobacco Company, he's a professional soccer
3 player and that his testimony is such and such?
4 Would that be agreeable to both of you?

5 MR. BRALY: I don't have any big problem
6 with it, Your Honor.

7 THE COURT: Why don't we do that.

8 MR. JENNINGS: If the Court please, I don't
9 like a stipulation just singling out that there are
10 so many people under certain age playing soccer.
11 That in and of itself doesn't mean anything.

12 THE COURT: Well, we can either do it that
13 way, or we can read that portion that says it, that
14 states if he were called he would testify that so
15 many are doing it.

16 MR. JENNINGS: I think we have to have some
17 identification of who Shep Messing is.

18 THE COURT: I understand. I contemplated
19 that by a stipulation that Shep Messing is a
20 soccer -- is he a professional soccer player?

21 MR. BRALY: Yes.

22 THE COURT: And that he's a rep for United
23 States Tobacco Company and that he has done clinics
24 at universities and military installations and --

25 MR. BRALY: Television commercials.

1 MR. FINNEGAN: I don't believe his
2 deposition went into those matters.

3 MR. JENNINGS: I don't believe there was a
4 word about television commercials in the deposition.

5 MS. DESCHAMPS-BRALY: If we are talking
6 about a stipulation, the film that is going to show
7 the advertisement is going to show him on his
8 television commercial.

9 THE COURT: Well, perhaps -- I think it is
10 relevant that there is some indication that he is
11 advertising and that nationally -- Is he advertising
12 nationally? Is that it?

13 MR. BRALY: TV commercials.

14 MS. DESCHAMPS-BRALY: (Nodding yes).

15 THE COURT: I guess we can either read all
16 this or we can work out some kind of stipulation,
17 whichever you think is a better way of doing it.

18 MR. FINNEGAN: Why don't we just read it,
19 Your Honor?

20 THE COURT: Excuse me.

21 MR. FINNEGAN: We will just read it.

22 THE COURT: All right. If you have an
23 objection as we go through it to something specific,
24 just raise it.

25 MR. FINNEGAN: Well, let me ask you --

1 THE COURT: I know you object to the whole
2 thing.

3 MR. FINNEGAN: Let me ask the Court. Is the
4 material dealing with the college clinics and the
5 clinics on military installations relevant? Because
6 that material begins at 6 and goes --

7 THE COURT: I don't think it is particularly
8 relevant. I would think you might want it in there.

9 MR. JENNINGS: I think so, too.

10 MR. FINNEGAN: I think so. Yes, Your
11 Honor.

12 MR. JENNINGS: If you want to read any
13 of it --

14 MR. BRALY: Judge, we have another matter we
15 would like to take up. We have a videotape called
16 "Drive To Win." It is a driver's education film made
17 by the U.S. Tobacco Company to teach presumably 15-
18 to 16-year-olds how to drive, and it features
19 prominently Harry Gant and the Skoal Bandit racer,
20 and we think it is relevant to the issue of youth
21 marketing and the marketing to young people. We ask
22 that be played. I understand Mr. Finnegan is
23 objecting to it.

24 MR. FINNEGAN: If the Court please, this
25 film was made by United States Tobacco Company as a

1 public service to foster safe driving. Harry Gant is
2 a race car driver, and he drives a car called the
3 Skoal Bandit. And this film was made to foster
4 driver education, and it is distributed, I
5 understand, through some educational materials
6 distributor.

7 There is no showing of any product, although
8 there is, I understand, Mr. Gant in his uniform that
9 he drives in and the car. But we really don't
10 believe that this is relevant to the issues in this
11 lawsuit. It is not listed as an exhibit either. It
12 has been produced, I think, sometime here.

13 MR. BRALY: That's not correct. We just got
14 the film right before the discovery cutoff, Your
15 Honor. We propose to offer the film. We think it is
16 extremely relevant. We have had it listed as an
17 exhibit, and it --

18 THE COURT: You say it is listed as an
19 exhibit?

20 MR. FINNEGAN: It is not listed as an
21 exhibit on anything that I have been able to find.

22 MR. BRALY: I thought the business and
23 pleasure was not listed.

24 MR. FINNEGAN: That's not listed either.

25 MR. BRALY: I thought you told me this one

1 was.

2 MR. FINNEGAN: No, I don't have any
3 information on that.

4 MR. BRALY: Your Honor, it was just produced
5 as part of the last week's batch of stuff, okay, and
6 it is not listed and it will be by tomorrow morning.
7 We are still digging through that stuff and we
8 propose to play it.

9 THE COURT: Right now I am going to sustain
10 the objection. I think that we are getting
11 cumulative now, and I will sustain the objection
12 right now. Let's go ahead and read the deposition.

13 MR. BRALY: Judge, one other thing. What
14 does the Court contemplate for a schedule on Mr.
15 Bantle's deposition?

16 THE COURT: Well, what I wanted to do was to
17 review that this weekend. Do I understand you have
18 got witnesses for all of tomorrow?

19 MR. BRALY: We have got -- no, we really
20 don't is the problem. We have got a marketing
21 witness which I suspect will take the morning, but we
22 have got one or two live witnesses who will
23 participate, but they will be short like these, and
24 this is what we planned on doing this afternoon and
25 tomorrow morning.

1 THE COURT: You have got witnesses for
2 Monday?

3 MR. BRALY: Yes.

4 MS. DESCHAMPS-BRALY: Yes. And all of those
5 are coming in from out of town.

6 THE COURT: None of those could come in
7 tomorrow?

8 MS. DESCHAMPS-BRALY: No. We tried. One is
9 the expectant father that I told you about that can't
10 do it, and the other one couldn't get permission to
11 get off the job; and the way they have worked out,
12 they are all flying in Sunday night.

13 THE COURT: What about Tuesday? What will
14 be up for Tuesday?

15 MS. DESCHAMPS-BRALY: We are trying to
16 figure our best. If we can fill in with them
17 tomorrow afternoon is what we are --

18 THE COURT: If you can do that, don't offer
19 anything you weren't going to offer otherwise, but I
20 think it would be helpful to everybody if I could do
21 it this weekend and then give you on Monday my
22 suggestions as far as deletions, what if any
23 deletions there are, and then you could do that on
24 Monday and show it on Tuesday if --

25 MR. BRALY: Okay.

1 THE COURT: That is what I would like to
2 do. If that is impossible --

3 MR. BRALY: We really would like to play
4 Bantle's deposition before we call our last four or
5 five witnesses. We may be able to put them on
6 Tuesday afternoon or Wednesday if we are able to play
7 Bantle between now and then.

8 THE COURT: Let's do the best we can. Let's
9 go ahead and show --

10 MR. BRALY: Your Honor, on the Gant film
11 that you overruled on high school drivers, how do we
12 make an offer of proof on that? Do we just submit
13 the film as a whole?

14 THE COURT: This is --

15 MS. DESCHAMPS-BRALY: This is a driving
16 educational film for high school students. The
17 problem is that in most of the films he's in his nice
18 racing outfit with the whole paraphernalia of U.S.
19 Tobacco and Copenhagen or whatever he's driving.

20 MR. JENNINGS: It's the Skoal Bandit.

21 MR. BRALY: They are playing the same music
22 that they play when they run the ads.

23 MS. DESCHAMPS-BRALY: And we think it is
24 very relevant.

25 THE COURT: How long is this?

1 MR. BRALY: Oh, it is a 20-minute film, as I
2 recall. Judge, at least my recollection is that the
3 last half of this was taken up by Harry Gant doing
4 his thing with the race car with the Skoal Bandit on
5 it.

6 THE COURT: Why wouldn't that indicate
7 trying to advertise to high school students?

8 MR. FINNEGAN: Well, Your Honor, I don't
9 believe that taking a race car driver who is a
10 professional race car driver becomes an advertisement
11 just because you put it in the context of a driver
12 educational program. I just don't see that that
13 follows. They used Harry Gant for driver education
14 because he's a professional race car driver.

15 THE COURT: I understand.

16 MR. JENNINGS: If the Court please, I don't
17 think we forced any of the high schools to use the
18 film, but just make it available to them, and if the
19 high school authorities think it is appropriate to
20 use the film, I think that's their problem.

21 MR. BRALY: Judge, they used Harry Gant as
22 an advertiser for their TV commercials.

23 THE COURT: I understand. I am going to
24 overrule the objection. I think that you can perhaps
25 explain that. I think it is -- you have got a

1 legitimate explanation, but I think there's also a
2 legitimate argument for the plaintiff on it. So I
3 will allow it to be shown.

4 MR. BRALY: We will read Shep's first and
5 then play it.

6 THE COURT: All right.

7 Go ahead and bring in the jury, Nancy.

8 (The following proceedings were had IN THE
9 PRESENCE AND HEARING OF THE JURY.)

10 MR. BRALY: Your Honor, we are going to play
11 the film first, and I am going to try and see if
12 there are some portions of this deposition we can
13 edit out before we get to it.

14 THE COURT: All right. What is the exhibit
15 number -- is there any voice? I guess there is some
16 voice on the tape.

17 MS. DESCHAMPS-BRALY: Yes, there is sound.

18 MR. BRALY: It would be 16-A, Your Honor.

19 THE COURT: Plaintiff's 16-A.

20 (Plaintiff's Exhibit 16-A was here presented to
21 the jury.)

22 MR. BRALY: Your Honor, we are prepared to
23 play the advertising film now or read Shep Messing's
24 deposition, either one.

25 THE COURT: Whichever you prefer. Go ahead.

1 MR. BRALY: Pardon?

2 THE COURT: Whichever you prefer. Have you
3 shown these to defense counsel?

4 MR. BRALY: Pardon?

5 THE COURT: Have these been shown to
6 counsel?

7 MR. BRALY: They furnished them to us.

8 THE COURT: I understand. Have you told
9 them what you were going to play?

10 MR. BRALY: We told them we were going to
11 play --

12 MR. FINNEGAN: If the Court please, we have
13 furnished quite a few advertisements. Many of them
14 we have no objection to; some of them we do, because
15 they relate to Skoal Bandits and other products that
16 weren't marketed until after decedent's death or
17 primarily because they were not shown until after the
18 decedent's death, Your Honor.

19 THE COURT: I think the scope of my ruling
20 involved any national advertising prior to his death,
21 so --

22 MR. BRALY: This particular one contains,
23 according to their designation, from 1980 to 1984.
24 Sean died on February 25th, 1984. I don't think it
25 could be cut any finer than that in terms of what

1 they have produced.

2 THE COURT: What do you say, Mr. Finnegan?

3 MR. FINNEGAN: There were four tapes, Your
4 Honor, that we have an objection to, Skoal Bandits,
5 Spring Break, 1984, --

6 THE COURT: Why don't you come on up?

7 (The following proceedings were had AT THE SIDE
8 BAR.)

9 THE COURT: Have you got one tape with all
10 of the ads on?

11 MR. BRALY: There are two tapes. The ads
12 clip stuck together. One of them appears for 1980 to
13 1984. The other one appears to be prior to that
14 time.

15 In addition, there is an ad, there is an
16 internal company document in the form of a videotape
17 that is called Padre Island Spring Break, and the
18 only portion of it that we think is particularly
19 important is about the first four minutes of it in
20 which the tobacco company says, "If we can get a
21 young user started using snuff at this age, we have
22 got a consumer for life." This was produced by
23 marketing, field marketing actually is what I think
24 it says, as a report back to management on the
25 success of their Padre Island thing.

1 The key item in the document is it expresses
2 the company's understanding if they could get a young
3 person started at this age, they have got a person
4 for a lifetime, got a customer for a lifetime.

5 MS. DESCHAMPS-BRALY: Your Honor, to that I
6 would add the fact that I don't know if Your Honor
7 has ever been to anything like spring break at Fort
8 Lauderdale or any of those type things, but when I
9 was in high school, I went to them all the time; and
10 although they are college events, as such, that's
11 where all the high school juniors and seniors flock.
12 That's the big event of the year. You go there to be
13 with the college break kids.

14 MR. FINNEGAN: If the Court please, --

15 THE COURT: Let's get back to the
16 advertising, as far as the national advertising.

17 MR. FINNEGAN: We are objecting here for
18 three tapes. As I understand it, we have a number on
19 each one of our tapes. We produced one audio tape
20 with No. 60430, and that tape relates to Skoal Bandit
21 ads.

22 MR. BRALY: It is an audio tape?

23 MR. FINNEGAN: It is an audio tape. That is
24 what I have here.

25 MR. BRALY: We are not talking about audio

1 tapes right now but TV tapes.

2 MR. FINNEGAN: Relating to Skoal Bandits,
3 and that, of course, wasn't played until I guess it
4 was in the latter part of '83 or '84, because that
5 product didn't come on the market until then, Your
6 Honor.

7 The second is an audio tape 60432, which
8 again relates to Skoal Bandits rock and roll song.
9 Our same objection, Your Honor. This is a product
10 that was introduced in '83 and '84.

11 And lastly, there is audio tape, Skoal
12 Bandit jingle. The document -- the number on that
13 tape is 73119-A, and our objection there is it
14 relates to a product that was put on the market after
15 Sean's illness was diagnosed. It is a product that
16 he has never used.

17 Now, our fourth objection and our last
18 objection is to a videotape document No. 77281.
19 This, as I understand it, is a videotape made by a
20 marketing consultant. It's a tape that relates to
21 what is called the Skoal Bandits Spring Break in
22 1984, South Padre Island. I understand that that is
23 similar to what college kids do in all parts of the
24 country, except in Texas they go to South Padre
25 Island, and the tobacco company takes its college

1 marketing reps and samples at Padre Island.

2 I have personally not seen this tape, Your
3 Honor, but I understand that it relates to Spring
4 Break 1984, which is long after the events that are
5 relevant to this lawsuit.

6 MR. BRALY: Judge, --

7 MR. FINNEGAN: Excuse me. And it was not
8 made by the company. It was made by a marketing
9 company, and I'm not sure exactly what the
10 relationship is. They probably did it under some
11 kind of contractual arrangement, but I'm not sure of
12 the exact relationship.

13 THE COURT: How was it used?

14 MR. FINNEGAN: I understand that they did
15 this just to see what was happening as a report back
16 to management. This has never been shown. This is
17 not an advertisement, Your Honor. This is, as I
18 understand, a marketing consultant that was connected
19 with the Skoal Bandits Spring Break program, did
20 those to show what was going on, and I understand
21 this was shown -- never broadcast. This was not used
22 in any advertisement. It was never shown to the
23 public.

24 MR. BRALY: We are offering it because it is
25 an admission. It was made as a report to senior

1 management on the activities of the company's field
2 marketing staff. It contains what we consider to be
3 an extremely important admission against the interest
4 of the company in the first five minutes of the tape
5 when they say that "we all know that if we could get
6 somebody started on our products at this age, that we
7 have got a customer for a lifetime."

8 MR. FINNEGAN: Somebody says that.

9 MR. BRALY: It is right there at the first
10 five minutes of the film.

11 MR. JENNINGS: What age are they talking
12 about? College age?

13 MR. BRALY: Pardon?

14 MR. JENNINGS: College age.

15 MR. BRALY: It says "kids at this age," and
16 it shows pictures of them. You can take your
17 choice. I mean, Judge, they are pretty young.

18 MR. FINNEGAN: Your Honor, I don't believe
19 this has anything to do --

20 THE COURT: How about the Skoal Bandit?

21 MS. DESCHAMPS-BRALY: I think the ones you
22 are talking about now are videotapes today. We
23 haven't even gotten to the audio tapes.

24 MR. BRALY: We have got videotapes of the TV
25 commercial.

1 MS. DESCHAMPS-BRALY: We can play the other
2 commercials first and leave this one that we are
3 arguing about until last.

4 THE COURT: There is no argument about the
5 other tapes?

6 MR. FINNEGAN: There is no argument about
7 the other ones.

8 THE COURT: Let's play the other one and
9 hold the interoffice one in abeyance.

10 MR. FINNEGAN: Thank you, Your Honor.

11 (Exhibit 16-B was here presented to the jury.)

12 THE COURT: What is the exhibit number of
13 that videotape just played? Just a second. Is that
14 16-A?

15 MR. BRALY: Yes, it was.

16 THE CLERK: No.

17 MS. DESCHAMPS-BRALY: That was the one
18 before.

19 THE CLERK: That was the one before.

20 MR. BRALY: 16-B, Your Honor.

21 THE COURT: Is it 16-B?

22 MR. BRALY: Yes.

23 THE COURT: All right. 16-B will be
24 admitted.

25 MR. BRALY: Your Honor, if you will, he's

1 got a small problem with his machine. We will read
2 Shep Messing's deposition.

3 THE COURT: That's fine.

4 MR. BRALY: I will call my reader here.

5 If it please the Court, this is the
6 deposition of Shep Norman Messing, taken on behalf of
7 the plaintiff on Thursday, April 24th, 1986, before
8 Maynard E. Peterson, a notary public in and for the
9 State of Oklahoma. George W. Braly appeared for the
10 plaintiff. Timothy M. Finnegan appeared for the
11 defendant.

12 SHEP NORMAN MESSING,
13 called as a witness on behalf of the plaintiff by
14 deposition, testified as follows:

15
16 DIRECT EXAMINATION

17 BY MR. BRALY:

18 Q. Mr. Messing, state your full name, please.

19 A. Shep Norman Messing.

20 Q. How are you employed?

21 A. I'm employed by U. S. Tobacco.

22 Q. Any other employment?

23 A. Yes. I played professional soccer.

24 Q. Any particular team?

25 A. I played with the New York Express.

1 Q. What is the New York Express?

2 A. It's an indoor soccer team that plays at the
3 Nassau Coliseum.

4 Q. In New York?

5 A. Right.

6 Q. You understand that you are talking to a
7 jury in Oklahoma today?

8 A. Yes.

9 Q. How old are you?

10 A. I am 36.

11 Q. When did you start playing soccer?

12 A. I believe I started about 15.

13 Q. When you were about 15?

14 A. Right.

15 Q. Where was that?

16 A. On Long Island.

17 Q. Is that where you grew up and went to
18 school?

19 A. Yes.

20 Q. Whereabouts on Long Island?

21 A. I grew up in Rosland Heights.

22 Q. Did you play soccer in college?

23 A. Yes, I did.

24 Q. And where?

25 A. I played at NYU, New York University, and I

1 played at Harvard.

2 Q. When were you playing soccer for the Harvard
3 soccer team, what years?

4 A. I played for the Harvard team in the 1970-71
5 year, the 1971-72 year.

6 Q. Harvard is a member of one of the Ivy League
7 schools; is that correct?

8 A. That's correct.

9 Q. The Ivy League schools have been playing
10 college soccer in this country for a number of years,
11 haven't they?

12 A. Yes, they have.

13 Q. The oldest tradition of college soccer there
14 is in the country, aren't they?

15 A. I'm not quite sure who started it.

16 Q. It is true that soccer as a college sport
17 outside of the Ivy League and some other schools, a
18 small number of other schools, has only recently
19 started to emerge as a major national college sport;
20 is that correct?

21 A. I don't know if I could answer about the
22 status of collegiate soccer as a major sport.

23 Q. Can you give the jury any useful information
24 on that subject?

25 A. No, I just -- just answered. I don't think

1 I can comment on that.

2 Q. Is that because you don't have any knowledge
3 or understanding of the scope of college soccer?

4 A. No, that's not why.

5 Q. Well, then, tell the jury what the reason
6 is.

7 A. Because I don't think I'm in a position to
8 comment on what's considered a major college sport or
9 not.

10 Q. You don't have any views on that subject?

11 A. No.

12 Q. When did you start playing professional
13 soccer?

14 A. I started playing professional soccer in
15 1973.

16 Q. Did you ever play for any olympic teams?

17 A. Yes, I did.

18 Q. When was that?

19 A. I played for the 1972 U.S. Olympic team.

20 Q. And where were those games held?

21 A. Those games were held in Munich, West
22 Germany.

23 Q. How many professional soccer teams are there
24 in the United States?

25 A. I believe there are 12 professional teams.

1 Q. How many players are on a team in soccer?

2 A. There are two different kinds of soccer.

3 The professional soccer that I just mentioned is

4 indoor soccer. Indoor soccer has five players and a

5 goalkeeper. Outdoor soccer has ten field players and

6 a goalkeeper.

7 Q. On a professional soccer team, approximately
8 how many players will there be that are full-time
9 employees of the professional soccer team?

10 A. I would guess usually 18.

11 Q. And there is 12 of those teams in the United
12 States?

13 A. I don't know if all 12 are active. I heard
14 that one might have folded last week. 11 or 12.

15 Q. What are your duties on behalf of United
16 States Tobacco Company?

17 A. My duties involve being a marketing
18 specialist in soccer.

19 Q. Would you explain to the jury what that
20 involves?

21 A. Oh, basically I set up various programs for
22 the company.

23 Q. Can you be a little more informative?

24 A. Yes. I've set up a couple of different
25 programs. National collegiate soccer clinic program,

1 national military base clinic program.

2 Q. What does your national collegiate soccer
3 programs involve?

4 A. They involve a clinic at various schools
5 across the country, various colleges. The clinic is
6 in the format of a two-hour demonstration of soccer
7 skills, techniques. It's a clinic program that has
8 variations.

9 Q. How many different colleges have you
10 conducted these clinics at?

11 A. I can't remember exactly. I would imagine
12 in the neighborhood of 20 clinics a year.

13 Q. Can you give me the name of some of the
14 colleges at which you have put on these clinics?

15 A. Offhand none jump out at me. I don't
16 remember specifically.

17 Q. Do you remember the names of any of the
18 cities in which any of these 20 different colleges
19 are located?

20 A. Yes. I believe I did a college clinic in
21 Boston, did one in I think it was Raleigh, North
22 Carolina, Raleigh-Durham area.

23 Q. Mr. Messing, can you think of any others?

24 A. Not offhand.

25 Q. So of the 20-some-odd colleges that you have

1 given clinics at, you cannot think of any of their
2 names; is that correct?

3 MR. BRALY: Skip to Line 10.

4 A. That's correct.

5 Q. How much are you being paid to represent the
6 U.S. Tobacco Company?

7 MR. BRALY: Line 19.

8 A. I am paid 38,000 a year.

9 Q. And it is your responsibility to set up
10 programs which include college clinics and clinics on
11 military bases; is that correct?

12 A. Correct.

13 Q. And having -- is there anybody in the U.S.
14 Tobacco Company that has that responsibility?

15 A. In terms of soccer?

16 Q. Yes.

17 A. No.

18 Q. So you are it in terms of soccer?

19 A. Witness (nodding yes).

20 Q. And you are their marketing specialist in
21 terms of soccer; is that correct?

22 A. That's correct.

23 Q. And as their marketing specialist, you are
24 unwilling or unable to comment in any respect on the
25 scope of soccer among colleges and universities in

1 the United States?

2 MR. BRALY: Skip to Line 7 on the next page.

3 A. I don't understand the way you phrase the
4 question. I did not say that I am unwilling to
5 comment on soccer, and I did not say I can't. I
6 answered your question the best that I could.

7 Q. Can you tell the jury how many colleges in
8 the United States play soccer?

9 A. No, I can't.

10 Q. Can you tell the jury whether it is a major
11 college sport?

12 A. I repeat, I don't know what constitutes a
13 major sport.

14 Q. Do you know what constitutes a minor sport?

15 A. No, I don't.

16 Q. So you can give the jury no useful
17 information by which they may be able to determine
18 the scope of college soccer in the United States?

19 A. Not using the words minor and major in the
20 context of the question you have asked.

21 Q. Mr. Messing, my question was could you give
22 the jury useful information on this subject?

23 A. I believe I answered your question.

24 MR. BRALY: Skip to the question at Line 20.

25 Q. Mr. Messing, will you tell the jury what you

1 know about the scope of college soccer in the United
2 States?

3 A. In general terms, soccer at the collegiate
4 level is a sport that has been growing for the last
5 ten years. Where it fits in the scheme of things
6 with collegiate sports, I'm not quite sure.

7 Q. Now, can you identify for the jury any of
8 the colleges at which you have given the 20 or more
9 clinics that you have conducted each year?

10 A. I believe I answered that question.

11 Q. Well, I am waiting on an answer to my
12 question.

13 A. I believe I answered that question.

14 Q. Tell us again what you think the answer was
15 that you gave to that question.

16 A. I can't remember specifically the colleges
17 that I have given the clinics at.

18 Q. Can you remember any single one of the
19 colleges at which you have given a clinic?

20 A. No, not for sure.

21 Q. When was the last clinic that you gave?

22 A. About three years ago.

23 Q. Do you remember where that was?

24 A. No, I don't.

25 Q. Do you remember what state it was in?

1 A. No, I don't.

2 Q. Do you remember whether it was on the West
3 Coast or the East Coast?

4 A. No, I don't.

5 Q. I take it you haven't done any college
6 clinics in the last three years.

7 A. I said I believe the last college clinic I
8 did under that program was three years ago.

9 MR. BRALY: Skip to Line 18.

10 Q. What else have you been doing in the last
11 three years on behalf of United States Tobacco
12 Company if you have not been conducting college
13 clinics?

14 A. About three years ago I instituted a
15 military base soccer clinic program for U.S. Tobacco.

16 Q. And that is all you have been doing for the
17 last three years?

18 A. About three years ago I instituted a
19 military soccer clinic program for U.S. Tobacco.

20 Q. Was that the only activities that you have
21 been engaged in in the last three years on behalf of
22 U.S. Tobacco?

23 MR. BRALY: Skip to 11.

24 A. That's been my primary job responsibility.

25 Q. Tell us what the other responsibilities have

1 been besides that one?

2 A. Evaluating different soccer proposals,
3 different soccer marketing ideas that come to me or
4 that I bring to the company.

5 Q. How many clinics have you given at military
6 bases on soccer?

7 A. I believe about the same number that I was
8 doing for the college clinics, about 20 a year.

9 Q. Can you identify each of the professional
10 soccer teams for which you have played?

11 A. Yes, I can.

12 Q. Would you do that, please?

13 A. I played professionally for the New York
14 Cosmos, for the Boston Minutemen, back to the New
15 York Cosmos, for the Oakland Stompers, for the
16 Rochester Lancers, for the New York Arrows, back to
17 the Cosmos again, for the Pittsburgh Spirit. I
18 believe that's it.

19 Q. When did you last play for the Cosmos?

20 A. I believe it was about a year ago December.

21 Q. When would you give a soccer clinic? Tell
22 the jury what would be the typical format of the
23 college soccer clinic.

24 A. The typical format, and as I mentioned
25 before, there were variations, depending upon what

1 the college coach wanted, but the typical clinic
2 involved my being on the campus on the soccer field
3 going through about an hour of different techniques,
4 shooting, passing, dribbling, goalkeeping, questions
5 and answers, ending up with a really -- I could only
6 call it a show by myself and the goal. About a
7 two-hour format, again covering techniques, skills of
8 the game, talking, and a bit of a show.

9 Q. Would there typically be a college game that
10 would occur in connection with your appearance?

11 A. I wouldn't say "typically." There were some
12 times that I ran a clinic either on the morning of a
13 college soccer game or on the day of a college soccer
14 game. I wouldn't say "typically." I would think
15 that more of -- more times than not there was no
16 college soccer game at the time.

17 Q. Were there ever any soccer games for young
18 people that occurred on the same day at the same
19 field?

20 A. No, not that I know of.

21 Q. Did you ever give a soccer clinic at the
22 Florida Institute of Technology Invitational Soccer
23 Tournament?

24 A. The name sounds familiar. I believe I did,
25 but I'm -- can't be sure.

1 Q. Didn't you give a goalkeeping demonstration
2 at half time during that tournament?

3 A. I said the name sounded familiar and it's
4 possible that I did, but I'm not sure.

5 Q. Didn't you conduct a free clinic on the
6 field between 2:30 and 4 o'clock in the afternoon
7 during that event?

8 MR. BRALY: Skip to Line 22.

9 THE READER: Page 17?

10 MR. BRALY: Yes. Excuse me. At that point
11 I handed the document to the witness, and there is a
12 question.

13 Q. Mr. Messing, is that a photograph of you on
14 the side of the article?

15 MR. BRALY: Line 22.

16 A. Yes, it is.

17 Q. Okay. Did you give a clinic at Florida
18 Institute there that is referred to?

19 A. I have never seen this before, this
20 document. It certainly looks like I was down at FIT
21 and put on a clinic. I have never seen this document
22 before.

23 Q. Isn't it true that they had a 19-and-under
24 soccer game at that clinic and later in the day they
25 had another youth game for 12-and-unders?

1 A. It may well be that that is what it says
2 here. I --

3 Q. Isn't it true that between 2:30 and 4
4 o'clock in the afternoon that you gave a free clinic
5 at the same place?

6 A. Again, I don't know what went on before or
7 after. When I set up the college clinic programs, I
8 only deal with the university and the colleges. It
9 looks like I gave a clinic or show at half time of a
10 college tournament.

11 Q. They drew names and gave anybody a chance to
12 shoot goals against you, didn't they?

13 A. That was one of the formats that we used
14 when I put on a half-time show.

15 Q. And you were appearing at that clinic on
16 behalf of the U.S. Tobacco Company?

17 A. Yes, I was.

18 Q. The tournament was sponsored by the
19 Melbourne, Florida, Kiwanis Club?

20 A. I don't know who the tournament was
21 sponsored by.

22 Q. The proceeds were to be turned over to youth
23 soccer programs of the Melbourne Kiwanis Club; isn't
24 that correct?

25 A. I don't know who it was sponsored by or who

1 the proceeds of the tournament went to.

2 Q. Are you telling me that you would go down
3 and appear at a tournament without learning those
4 details?

5 A. The details that concerned me were dealing
6 with the universities and colleges, the athletic
7 director, the coach, making sure that my clinic, my
8 national clinic program, that my clinic was to take
9 place at the college or university. Those aren't
10 details that concerned me.

11 Q. What is Kick Magazine?

12 A. Kick Magazine, I believe, used to be a
13 program or a magazine involving the NASL. I believe
14 now it is a private soccer publication. I'm not
15 quite sure, but Kick originally was a program put out
16 by the NASL.

17 Q. What is the NASL?

18 A. It is North American Soccer League.

19 Q. And what is its purpose or function?

20 A. It was a professional league that no longer
21 operates.

22 Q. Put out a magazine called Kick that had a
23 subtitle of being America's soccer magazine?

24 A. I'm not quite sure how it operated, but when
25 the NASL played, Kick Magazine -- I don't know the

1 setup -- was a magazine that each team in the league
2 had. I'm not sure how it operated.

3 Q. When did you first go to work for the United
4 States Tobacco Company?

5 A. I first went to work for U.S. Tobacco in I
6 believe it was 1970.

7 Q. What did you do for them in 1970?

8 A. In 1970 I was a college representative for
9 them.

10 Q. And where were you a college representative?

11 A. At Harvard.

12 Q. What were your duties as a college
13 representative in 1970?

14 A. My duties were to sample college student
15 population.

16 Q. When did you do your first commercial for
17 U.S. Tobacco?

18 A. I believe it was around 1978.

19 Q. When did you start using smokeless tobacco?

20 A. I think I started using smokeless tobacco
21 around 1972, 1973.

22 Q. What do you do during the off soccer season?

23 MR. BRALY: Line 7.

24 A. Primarily, my function is for U.S. Tobacco.

25 Q. You are talking about your appearances at

1 the military bases?

2 A. That was the primary function.

3 Q. What other functions?

4 A. I think I repeated that before. Evaluating,
5 analyzing, making recommendations concerning the
6 soccer proposals.

7 Q. What brand of snuff did you first start to
8 use in 1972 or 1973?

9 A. I started using Skoal.

10 Q. Is soccer a sport that is popular among high
11 school students?

12 A. I think that it is.

13 Q. Is soccer a sport that is popular among
14 junior high students?

15 A. I think that it is.

16 Q. Is soccer a sport that is popular among
17 grade school students?

18 A. I think that it is.

19 Q. Isn't it true that approximately
20 three-fourths of the soccer players in the United
21 States are under the age of 18?

22 A. I don't have any statistics, percentagewise,
23 in terms of those numbers you just mentioned.

24 Q. Isn't that basically accurate?

25 A. Again, I can't answer percentagewise when

1 you say three-quarters. I don't know.

2 Q. Let me put it this way. Isn't it true that
3 the vast majority of people that play soccer in the
4 United States are -- have not yet graduated from high
5 school?

6 A. No, I don't believe that's true.

7 Q. You don't think that's true?

8 A. No.

9 Q. How many college teams are there in the
10 United States?

11 A. I think I told you before I'm not quite
12 sure.

13 Q. And there is only 12 professional teams?

14 A. Correct.

15 Q. And you don't know how many college teams
16 there are?

17 A. I believe I answered that. I don't know
18 exactly how many.

19 MR. BRALY: Skip to Line 11.

20 Q. Isn't it true, Mr. Messing, there are
21 literally thousands of high schools where kids play
22 soccer?

23 A. Thousands of high schools where kids play
24 soccer?

25 Q. Yes.

1 A. I can't answer that. I don't know.

2 Q. Are you denying that that's true?

3 A. I can't deny it; I can't admit it. I don't
4 know how many play.

5 Q. You don't have any idea?

6 A. I think I just answered that question.

7 Q. You don't have any idea. Isn't it true that
8 there are thousands of junior highs where kids play
9 soccer?

10 A. I don't have any numbers on how many junior
11 high play soccer.

12 Q. Isn't it true that there are thousands of
13 grade schools where kids are playing soccer?

14 A. I don't have any numbers on how many grade
15 schools play soccer.

16 Q. Isn't it true that there are approximately 5
17 million boys, 2 million girls in the United States
18 that are playing soccer that are under the age of 18?

19 A. Could you repeat those numbers?

20 Q. Yes. Isn't it true that there are
21 approximately 5 million boys and 2 million girls that
22 are under the age of 18 that are playing soccer?

23 A. I can't say for sure, but I would think so.

24 Q. And isn't it true that there's only about
25 eight-and-a-half million people in the United States

1 altogether that play soccer?

2 A. I don't think that's true.

3 Q. Do you know what the number is?

4 A. I've heard all different kinds of numbers
5 for the people that play soccer in this country.

6 Q. Such as?

7 A. I've heard 2 million; I have heard 5
8 million; I have heard 10 million; I have heard 15
9 million.

10 Q. 15 million is the highest number that you
11 have heard?

12 A. I believe so.

13 Q. So if we got 5 million boys under the age of
14 18 and 12 million girls under the age of 18, we
15 would have 7 out of the highest number you know, 7
16 million out of the 15 million would be under the age
17 of 18 playing soccer, right?

18 A. No, that's not right.

19 Q. You just told me a minute ago that you
20 thought the number 5 million and 2 million was about
21 right. You did tell me that, didn't you?

22 A. I think that's about right.

23 Q. And you think maybe the highest number you
24 have ever heard altogether is a 15 million number?

25 A. No, I didn't clarify what age I was talking

1 about.

2 MR. BRALY: Skip to 24.

3 Q. Mr. Messing, do you have any other piece of
4 information on this subject that you think the jury
5 ought to know about in order to understand what we
6 are talking about?

7 A. No, I believe I answered those questions.

8 Q. Isn't it true, Mr. Messing, that more kids
9 are playing soccer than the total of the combined
10 number of kids that are playing little league and
11 midget football?

12 A. I have heard that before.

13 MR. BRALY: I move the admission of the
14 exhibit, and I have no further questions.

15 THE COURT: Is there anything further we can
16 address this afternoon?

17 MS. DESCHAMPS-BRALY: We have one more tape
18 commercial, Your Honor, at this time.

19 MR. BRALY: We have got a witness, a live
20 witness.

21 THE COURT: Good.

22 MR. BRALY: Do you want to do that now?

23 THE COURT: Let's go ahead, yes, sir.

24 MARVIN HENTZEL,
25 called as a witness on behalf of the plaintiff, being

1 first duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. BRALY:

4 Q. Would you state your full name, please.

5 A. Paul Marvin Hentzel.

6 Q. Mr. Hentzel, how are you employed?

7 A. I'm a patent attorney in private practice.

8 Q. Where do you live?

9 A. In Palo Alto, California.

10 Q. In connection with this litigation, have you
11 had occasion to review some of the magazines in
12 general circulation to search for advertising by the
13 U.S. Tobacco Company?

14 A. Yes, sir.

15 Q. What magazines have you looked at in
16 particular?

17 A. Sports Illustrated and Field & Stream.

18 THE COURT: Excuse me, I missed your name,
19 what was your name?

20 THE WITNESS: Paul Hentzel.

21 THE COURT: Go ahead.

22 Q. (BY MR. BRALY) What magazines again?

23 A. Sports Illustrated and Field & Stream.

24 Q. What years did you start looking?

25 A. Sports Illustrated, I started in '69 and

1 went till '79, and Field and Stream, I started in
2 1975 and went until 1978.

3 Q. How did you go about doing this? Why don't
4 you pull the microphone a little bit closer to you.

5 A. I went to Stanford library, Stanford
6 Business School library, and I just pulled the bound
7 volumes off the shelf and thumbed through them page
8 by page. There were over 500 issues of Sports
9 Illustrated. About a hundred pages per magazine,
10 that's 5,000 pages. It took about a hundred hours of
11 work to do that.

12 Q. Did you find any ads --

13 A. Yes.

14 Q. -- that were run there by the United States
15 Tobacco Company?

16 A. Yes, I did.

17 Q. Now, with respect to Field and Stream what
18 did you do in that connection?

19 A. That was easier. I had only four years to
20 look through. It's a monthly publication. It has
21 only -- it has 150 pages. It took about nine hours
22 to do that.

23 Q. Now, does is your law practice consist of?

24 A. Patent work, trademark work and copyright
25 work.

1 Q. Mr. Hentzel, let me hand you what has been
2 marked as Exhibit 17. Tell us what that document is.

3 A. This is the report I submitted to Mr.
4 Braly. It contains photographs or photographic
5 copies of all the advertisements that I found in
6 Sports Illustrated and Field & Stream. It contains
7 photographs also of the covers of the magazines, and
8 related advertising in the magazines.

9 Q. Mr. Hentzel, I'm sure the Court probably
10 doesn't want all of that in the record and, but does
11 this represent the ads that you found in going
12 through the Sports Illustrated and Field and Stream?

13 A. Yes.

14 Q. Now, from those have you prepared some
15 blowup exhibits that are representative of those ads
16 through the years?

17 A. Yes, sir.

18 Q. Are these those right here?

19 A. Yes, sir.

20 MR. BRALY: They have been shown to the
21 other side and have been marked as 17-A and B.

22 MR. JENNINGS: We have an objection, Your
23 Honor.

24 THE COURT: Why don't you bring it up.

25 (The following proceedings were had AT THE SIDE

1 BAR.)

2 MR. JENNINGS: If the Court please, these
3 have comments on them.

4 MR. BRALY: Yes, they sure do, Judge. The
5 tobacco company in 1977 started putting a disclaimer,
6 you can't read it, but it is right there above my
7 thumbnail. It says "offer not available to buyers."
8 Okay? Prior to that time, they didn't have one of
9 those on it. That's all that the comments are.

10 THE COURT: Why don't you just take those
11 off and he can testify about that, if he wants, just
12 take those off.

13 MR. BRALY: It is just a demonstrative
14 exhibit, judge.

15 THE COURT: I understand, just take them
16 off.

17 Any other objection to the exhibit?

18 MR. JENNINGS: No objection.

19 THE COURT: With that change, 17-A and B
20 will be admitted

21 (The following proceedings were had IN OPEN
22 COURT.)

23 Q. (BY MR. BRALY) Mr. Hentzel, are those the
24 two exhibits you were talking about?

25 A. Yes, sir.

1 Q. Let's start on the left-hand side. You may
2 have to get up and look at those, but tell us what
3 the one in the upper left-hand corner is on 17-A.

4 A. This was an ad, it was January, 1969.

5 This is a very similar ad, there was a whole
6 series of these, nine or ten, this was the first and
7 this was the last. These ads contained an offer for
8 free snuff and instruction booklet, and no age was
9 mentioned in the advertisement.

10 Q. Excuse me, Mr. Hentzel. When you say no age
11 was mentioned, are you talking about a restriction on
12 writing in for free samples?

13 A. Yes, sir.

14 Q. Now, what is the next one that you see, go
15 from top to bottom?

16 A. Yes, yes, sir.

17 Q. All right.

18 A. This was a one-of-a-kind ad. It also was
19 free snuff, free booklet, no age was mentioned, on
20 receiving the snuff.

21 Q. What is in the background behind the
22 Copenhagen, Skoal and Happy Days signs?

23 A. A series of no smoking signs.

24 Q. Would you read where title is at the top.

25 A. Enjoy rich tobacco flavor without smoke.

1 Q. What issue of Sports Illustrated was that in
2 that year? Is that a photograph of the cover right
3 there?

4 A. Oh, yes, excuse me, yes. 19 October 1970.

5 Q. What does it say on the cover of the
6 photograph of the cover that you got there?

7 A. World Series, Sports Illustrated, World
8 Series.

9 Q. That was the World Series issue?

10 A. Yes, sir.

11 Q. Start at the next column.

12 A. This was the first of a series of four ads.
13 It just showed the four cans, a discussion of snuff,
14 a brief history, again it was free snuff and
15 instruction booklet and no age restriction on who
16 could write in to get it.

17 Q. And what issue of Sports Illustrated did
18 that one come out of?

19 A. 15 November 1971.

20 Q. What does it say on the cover of that week's
21 magazine?

22 A. Sports Illustrated, Sapporo, 1972 Olympic
23 Scene.

24 Q. Okay. The next ad?

25 A. This was the first of a series, just like

1 this picture here. Again free snuff, and instruction
2 booklet, and no age restriction, on who could receive
3 the snuff.

4 Q. What does the caption on the ad say?

5 A. "I love tobacco. I don't smoke."

6 Q. And again what was the year or the year and
7 week or date?

8 A. 16 September 1974.

9 Q. And who is on the cover of Sports
10 Illustrated that week?

11 A. O. J. Simpson.

12 Q. All right. The next one at the bottom?

13 A. This was the first ad that showed an age
14 restriction for receiving the snuff. It was free
15 snuff, no booklet, it has a legend "Not available to
16 minors" down here, very small. And it also has a
17 copyright notice on the other side.

18 Q. You are a copyright attorney.

19 A. Yes, sir.

20 Q. What is the significance of a copyright
21 notice in the size of the print?

22 A. Well, the significance is, it's a claim of
23 copyright ownership of the subject matter of the
24 work, and it must be visible on reasonable
25 inspection, and it's typically the smallest print on

1 the work.

2 Q. And is the print for the age restriction any
3 larger than the copyright notice?

4 A. No, sir.

5 Q. The next column on the other -- before you
6 do this.

7 MR. BRALY: Your Honor, with the Court's
8 permission, I would like to put this up on the jury
9 rail so the jury can see the size of the print.

10 THE COURT: Okay.

11 Q. (BY MR. BRALY) I call your attention to the
12 next chart right there. Is that a continuation?

13 A. Yes. That's another U.S. Tobacco
14 advertisement.

15 Q. Again for Sports Illustrated on the
16 left-hand side?

17 A. Yes, Sports Illustrated, free snuff, no
18 booklet. "Offer not available to minors" right next
19 to the copyright notice, Circle C, 1978, U.S. Tobacco
20 Company.

21 Q. The one below it?

22 A. This one was a little different. Free
23 snuff, no booklet, copyright notice, a youth legend,
24 Not available to minors, limited to one sampling per
25 family.

1 Q. Is that the smallest print on the page?

2 A. Yes, sir.

3 Q. Sports Illustrated again?

4 A. Yes, sir.

5 Q. Go over to Field & Stream now.

6 A. These three were from Field & Stream. This
7 is one of the series of advertisements, free booklet,
8 free snuff, no age legends, no copyright notice.

9 Q. What year?

10 A. December 6th, 1970 -- excuse me, December,
11 1976.

12 Q. And the next one down?

13 A. This one free snuff, no booklet, not
14 available to minors, and a copy right notice.

15 Q. What year?

16 A. April, 1978.

17 Q. The one at the bottom?

18 A. This one is free snuff, a booklet, no age
19 restriction, no copyright notice.

20 Q. What is the date on that one?

21 A. September, 1978.

22 Q. 1978?

23 A. Yes, sir.

24 Q. Sean Marsee was born in 1964, he would have
25 been 14 years old in 1978?

1 A. Yes, sir.

2 Q. Mr. Hentzel, how did you and I get
3 acquainted?

4 A. I met you in January of this year in Boston.

5 Q. A conference of attorneys?

6 A. Yes, sir.

7 Q. Looking into a litigation involving the
8 tobacco company?

9 A. Yes, there was a conference of plaintiff's
10 attorneys.

11 Q. How did you come to do this work for me?

12 A. I heard about the case from you and I became
13 interested in the case and volunteered to do this
14 work.

15 Q. Did I agree to reimburse your expenses on
16 this?

17 A. Yes, sir.

18 Q. What kind of equipment have you had to buy
19 in order to generate these?

20 A. I had to buy a camera, several lenses,
21 miscellaneous attachmentments for both controls,
22 shutter control, lamps, a copy board, a vertical
23 post.

24 Q. That's enough.

25 A. Yes, sir.

1 MR. BRALY: We would move the admission of
2 the exhibit, Your Honor.

3 THE COURT: They are admitted. 17-A and B.

4 MR. BRALY: I have no further questions of
5 this witness.

6 CROSS EXAMINATION

7 BY MR. JENNINGS:

8 Q. You live in Palo Alto?

9 A. Yes, sir.

10 Q. And did you travel from Palo Alto to
11 Oklahoma City for the purpose of this testimony?

12 A. Yes, sir.

13 Q. To testify about what advertisements there
14 were in the magazines?

15 A. Yes, sir.

16 MR. JENNINGS: I have nothing further.

17 THE COURT: You may step down. You are
18 excused.

19 THE WITNESS: Thank you, sir.

20 MR. BRALY: Judge, --

21 THE COURT: Nancy, we admitted 17-A and - B.

22 THE CLERK: A and B.

23 MR. BRALY: Your Honor, we would like to
24 play the Padre Island spring break film at this time,
25 unless the Court would prefer to withhold a ruling on

1 that.

2 THE COURT: Yes, I would like to see that.
3 Is there anything else?

4 MR. BRALY: No, I don't think -- let me
5 check, maybe some of the people -- That's it, Your
6 Honor, we have got two documents we need to read and
7 publish to the jury.

8 THE COURT: Why don't you bring those up.
9 Have you seen these?

10 MR. FINNEGAN: Yes.

11 MR. BRALY: Without objection.

12 THE COURT: Do you have objection?

13 MR. JENNINGS: No objection.

14 THE COURT: What are the Exhibit numbers?

15 MR. BRALY: They are Trial Exhibits 338 and
16 339.

17 THE COURT: All right 338 and 339 will both
18 be admitted.

19 Go ahead.

20 MR. BRALY: I would like to circulate them
21 to the jury, just read the letters, they are company
22 correspondence, Your Honor.

23 THE COURT: All right.

24 (The same were exhibited to the jury.)

25 MR. BRALY: First is a dated June 9, 1970,

1 on United States Tobacco Company Intra-Company
2 Correspondence, S. B. Erlandson, Vice President,
3 Greenwich Office, from Mr. O. D. Roeder, Plant
4 Manager, Chicago Branch, dated June 9th, 1970.

5 "Attached is the letter possibly, of the youngest
6 chewer that we have actually have record of. Dan
7 Oakley, Route 2, Fairland, Oklahoma 74343, apparently
8 has a problem opening cans of Skoal suggests that we
9 put some kind of a tear-tape on our packages.

10 Kindly handle this in your usual manner.

11 We would send him a complimentary roll, but
12 maybe we will get in trouble with the law."

13 June 24th, 1970, Mr. Dan Oakley. Route 2,
14 Fairland, Oklahoma, 74343.

15 "Dear Mr. Oakland:

16 Thank you for your recent letter addressed
17 to our Chicago plant, which has been forwarded to
18 this office for reply.

19 Concerning your suggestion that we put a
20 tear-tape on our Skoal cans for easier opening has
21 been given considerable thought by our factory. They
22 found, however, that they were unable to produce a
23 commendable product at a moderate price by using this
24 method.

25 We are sending you one of our openers which

1 we feel will solve your problem. Also enclosed is a
2 leaflet showing an easy way to open our snuff cans
3 without using the cutter.

4 Your interest in writing to us is very much
5 appreciated.

6 Very truly yours, M. O. Cote, Director of
7 Communications. P.S. We are also enclosing an
8 initial stainless steel cover for your Skoal can."
9 That's Plaintiff's Exhibit 339.

10 Plaintiff's Exhibit 338 is a letter to U.S.
11 Tobacco Company, dated July 20, 1982, U.S.T.C.
12 Nashville.

13 "Dear Sirs:

14 This is Kevin Fowler, one of your loyal
15 Skoal dippers. I just love your Skoal. But,
16 however, there are some problems. For one thing do
17 you know how much Skoal costs here in Jasper,
18 Alabama. It costs anywhere from 80 cents to \$1.05.
19 I am speaking for a lot of people when I say that is
20 slightly stiff. I could understand it if it were 65
21 to 75 cents, but when it goes over the dollar mark,
22 that is ridiculous. And another thing is when we
23 have to pay so much when you don't even fill the cans
24 completely up. Something has to be done. There are
25 a lot of us that play high school sports and we don't

1 have time for a job. All we get is about five
2 dollars a week from our parents. So when you dip 7
3 or 8 cans a week like me, \$5 will not even cover the
4 whole week.

5 What are we, your customers, supposed to
6 do. Because by the time I got buy Skoal I don't have
7 money for anything else. I can't quit Skoal. So you
8 better find a better solution. I am really tired of
9 being ripped off. Signed one of your mad customers,
10 Kevin Fowler.

11 I would like to hear what you have to say.
12 Kevin Fowler, [DELETED]

13
14 Attached to that letter is a U.S. Tobacco
15 Company complaint report.

16 Next to the word product is written "Skoal,"
17 date of complaint, a question mark.

18 "Complaint from Kevin Fowler, Address [DELETED]

19
20 Package size 1.2; Received By C. J. Provo;
21 referred to Corp. Affair; Explain/Opinion:
22 Partially filled cans and cost product may have
23 settled in transit in a partially filled can passed
24 the inspection.

25 Please send Mr. Fowler some complimentary

1 samples. C. J. Provo."

2 Your Honor, I think that leads us to the
3 Skoal Bandits spring break film.

4 THE COURT: All right, ladies and gentlemen,
5 we are going to recess now for the rest of the
6 afternoon. We will reconvene in the morning at 9:30,
7 remembering my usual admonitions to you. Have a nice
8 evening and just give those to counsel on your way
9 out.

10 We will reconvene at 9:30 in the morning.

11 Everyone remain seated while the jury exits.

12 (The following proceedings were had OUT OF
13 THE PRESENCE AND HEARING OF THE JURY.)

14 Do we have this spring break? I would like
15 to look at it.

16 MR. BRALY: We will take it up in just a
17 minute. Let me tell the Court what the problem is.
18 The problem is that the copies of the video tapes
19 that were produced by U.S. Tobacco for some reason
20 were produced and recorded at something other than
21 the standard recording speed, and so it has made it
22 impossible to play them on Paul's standard equipment,
23 and we had to run out and drag in a home VCR which we
24 will play to extended play speeds, and that's been
25 part of the hangup this afternoon. We would much

1 appreciate to have copies of those tapes that are
2 recorded at normal speeds so they can be played
3 normally.

4 MR. FINNEGAN: If the Court please, I heard
5 that for the first time this afternoon when we came
6 back to court. As far as I knew, we had produced the
7 tapes, given them to them and that they could be
8 played on recording equipment. I am not sure that I
9 know what standard is as opposed to what is not
10 standard.

11 MS. DESCHAMPS-BRALY: We are not blaming
12 anybody, we are just saying it happened.

13 THE COURT: Is the problem solved?

14 MR. BRALY: Well, we still got a problem
15 with some of these four-hour tapes playing. The
16 problem is when you record at the four-speed, the
17 quality which comes through is markedly awful, and
18 that's the problem. He is going to try to make this
19 one play. This one has been very difficult to get it
20 played on a half dozen machines. It will play on
21 some machines, won't play on some machines. We have
22 mentioned this problem to them in the past and asked
23 them to recopy this one, but we got another four-hour
24 tape from them.

25 MR. JENNINGS: If the Court please, I assume

1 that that is the way they were recorded, that they
2 weren't -- these were not for television
3 advertisements, and we produced them the same way
4 they were recorded, at least, I presume that's what
5 happened. I can find out.

6 MR. BRALY: Have you got a film?

7 VIDEO OPERATOR: Yes, I will make sure I
8 have got the right tape.

9 MR. BRALY: He has it so it will play now,
10 Your Honor.

11 VIDEO OPERATOR: Your Honor, I will turn
12 this set around so you can see it a little better, if
13 you don't mind.

14 MR. JENNINGS: We don't need to play them
15 for the audience?

16 VIDEO OPERATOR: Okay, I will turn that one
17 off.

18 THE COURT: We don't even need to -- Maynard
19 you don't need to take any of this down, I just want
20 to watch this.

21 Now, this was some kind of a marketing
22 outfit that did this study and presented it to U.S.
23 Tobacco; is that it?

24 MR. FINNEGAN: Yes, Your Honor.

25 MR. JENNINGS: All of it deals with college

1 students.

2 MR. BRALY: The title of the caption of it,
3 Your Honor, was National Field Marketing, that is the
4 field marketing for U.S. Tobacco Company.

5 MR. FINNEGAN: That -- well, that is an
6 organization that may have been working down there
7 for us, but it is not U.S. Tobacco Company. It deals
8 with college students, and it's events that took
9 place, when, last '83?

10 MR. JENNINGS: '84.

11 MR. FINNEGAN: '84, Your Honor.

12 MR. BRALY: Judge, you know, it was their
13 people, they hired them, it was their agents. They
14 produced the film as a report back to management.

15 THE COURT: Well, I am going to sustain the
16 objection. It just strikes me that there is
17 certainly nothing in the film that is relevant other
18 than perhaps that statement and unless you can show
19 that they were in fact an agent of -- I think that
20 might be relevant, if they are in fact an agent.

21 MR. BRALY: Judge, they wouldn't have made
22 it and sent it back to management. They said we know
23 that we can -- you know, it was all in the plural
24 possessive through the whole thing.

25 THE COURT: I understand.

1 MR. BRALY: It was produced from the files
2 of the U.S. Tobacco Company.

3 THE COURT: All right. I will sustain the
4 objection.

5 MR. BRALY: Note our offer of proof --

6 THE COURT: All right.

7 MR. BRALY: -- of the exhibit.

8 THE COURT: What else? Let's do this,
9 rather than burden the record with that tape -- is
10 that a tape by itself?

11 MR. BRALY: Yes.

12 MS. DESCHAMPS-BRALY: Yes.

13 THE COURT: Why don't we just show, if no
14 one has any objection to this, that that is a tape
15 displaying certain activities at South Padre Island
16 and it was apparently done by a marketing
17 organization and submitted to U.S. Tobacco Company
18 and the significant portion as suggested by the
19 plaintiff is that it says that if you have -- if you
20 get them started on what was it, on Copenhagen or
21 Skoal --

22 MR. BRALY: Snuff.

23 THE COURT: -- or snuff, you will have them
24 for a lifetime.

25 MR. BRALY: Yes.

1 THE COURT: Anything else about that that
2 you would like to put in the record? I don't see any
3 reason to have the tape in the record itself, unless
4 you particularly want it.

5 MR. BRALY: Judge, I think that's a
6 reasonably adequate description. That is the purpose
7 we want the document. I would like to reflect that
8 it says National Field Marketing on the front of it.
9 As far as I am concerned, unless the tobacco company
10 wants to stand up and say that that was not produced
11 at their request, then, I think it is clearly on its
12 face indicative of an agency relationship with the
13 company, and ought to be admitted. If they want to
14 stand up here and tell the Court that this was
15 not -- this document was not produced and paid for by
16 the U.S. Tobacco Company by people that were working
17 for U.S. Tobacco Company, then I think the Court's
18 objection is a good -- the Court's ruling is a good
19 ruling. But on the face of it coming from the
20 company's files and the statements made on the face
21 of the document, I would urge it to be admitted.
22 Like I say, I am really mostly interested in that
23 particular statement for the purpose of establishing
24 that knowledge on the part of the company. And I
25 think it is clearly on it's face a document that has

1 been created by an employee or somebody hired by the
2 company for that purpose.

3 THE COURT: Well, assuming for a moment that
4 it is -- I don't know if it is an employee, assume it
5 is an independent contractor. Is that what you are
6 saying it is?

7 MR. JENNINGS: Yes, Your Honor.

8 MR. FINNEGAN: Yes.

9 MR. JENNINGS: As far as I know.

10 MR. FINNEGAN: As far as we know, that's
11 what we understand.

12 THE COURT: Are they bound by a statement of
13 an independent contractor?

14 MR. BRALY: Well, to report back to
15 management, Your Honor, on what these people were
16 doing on behalf of the U.S. Tobacco Company. The
17 U.S. Tobacco Company hired these people to go out and
18 run this thing as a promotional event, and to report
19 back to the company the results of what they were
20 doing.

21 THE COURT: Well, I think you have got
22 significant other testimony on that same area that I
23 don't think it is necessary, and it does come after
24 the fact and the other portions of it I just don't
25 think is relevant at all. So I will just sustain an

1 objection.

2 MR. FINNEGAN: Thank you, Your Honor.

3 THE COURT: Now, let me ask you on this
4 73-B, the Health Implications of Smokeless Tobacco
5 Use. You are suggesting that is a governmental
6 publication. Just because it is a governmental
7 publication doesn't necessarily mean it's admissible.

8 Why do you say it is admissible?

9 MR. BRALY: It is a finding of considered
10 fact by an agency of the United States government,
11 the National Institutes of Health, and those findings
12 of fact are highly relevant to the issues in this
13 case. I think I can quote the particular passages
14 that most directly impact the causation issue in this
15 case. Let's see if I can find it for you right
16 quick: "Observations in Humans" this is Page 2 and
17 it is on the second page of the document. Under the
18 question "Does the use of smokeless tobacco increase
19 the risk of oral or other cancers?"

20 And the response is "Observations in Humans
21 provide convincing evidence for an increased risk of
22 oral cancer as a result of smokeless tobacco as the
23 result of the use of the smokeless tobacco."

24 And then over in the summary portion, it
25 states "The human evidence that use of snuff causes

1 cancer of the mouth is strong. Risk is particularly
2 high for parts of the mouth where the snuff is
3 usually placed." Those are the two findings with
4 respect to cancer, although, there are additional
5 although there are additional findings with respect
6 to nicotine addiction and other issues that are
7 involved in this case, including leukoplakia.

8 THE COURT: And what case have you cited,
9 Mr. Finnegan, that you thought was --

10 MR. FINNEGAN: Well, in our brief, Your
11 Honor, we cited a case, as I recall, that dealt with
12 a national consensus conference on DES
13 diethylstilbestrol when there was a controversy about
14 that matter. This is not a finding of fact, Your
15 Honor, it is a conclusion of a group of scientists,
16 many of whom were not government employees at the
17 time.

18 THE COURT: Okay. I will look at that over
19 the evening.

20 MR. FINNEGAN: Thank you.

21 THE COURT: I still -- if we could do it at
22 all, in regard to the Bantle deposition, I would
23 still like to do that this weekend. Assuming we do
24 that, what does that leave for tomorrow, Mr. Braly?

25 MR. BRALY: We have a marketing witness the

1 first thing in the morning and, frankly, I am going
2 to have to check after that. I suspect it is going
3 to take most of the morning.

4 THE COURT: Go ahead.

5 MR. BRALY: Judge, that is going to leave us
6 short tomorrow without Bantle's. We have got the
7 marketing expert and we have got one other live
8 witness coming over from Tulsa and --

9 MS. DANIA DESCHAMPS-BRALY: There are
10 probably other things that we could put in. I know
11 you don't want fillers just to --

12 THE COURT: No, I don't. Tell me next week
13 what is left other than Bantle's deposition and your
14 evidence tomorrow morning.

15 MS. DESCHAMPS-BRALY: Off the top of my
16 head, there is Cheryl Strickland. There are members
17 of the Marsee family. There's Sergeant Carl Evans.
18 There's a Michael Smardak, and an Andrew Slater.

19 THE COURT: Who are these people?

20 MS. DESCHAMPS-BRALY: Andrew Slater and Mr.
21 Smardak are both promoters of outdoor concerts who
22 will testify regarding their personal knowledge of
23 distribution of U.S. Tobacco products to minors, at
24 those promotional events.

25 Now, Cheryl Strickland is the pain therapist

1 who dealt with Sean at, I believe, Oklahoma Memorial
2 Hospital. Of course, the members of the Marsee
3 family, John O'Dell, the head of the Fellowship of
4 Christian Athletes in our part of the state who
5 became a close friend of Sean's during his last
6 months of his life, who will testify regarding Sean's
7 pain and suffering as well as his personal knowledge
8 of the view that young athletes have of looking up to
9 the professional athletes as their role models and so
10 forth. I am talking off the top of my head, because
11 I don't have a complete list with me. It will be the
12 members of the Marsee family, some testimony about
13 when he started and how he started.

14 THE COURT: You have got an economist, also.

15 MR. BRALY: Jim Horrell, also.

16 MS. DESCHAMPS-BRALY: Yes.

17 MR. BRALY: We might get them on.

18 MS. DESCHAMPS-BRALY: That's the one I
19 didn't remember. He is scheduled, as far as I know,
20 for tomorrow afternoon.

21 MR. BRALY: We have got to have the issue of
22 earnings resolved.

23 THE COURT: We are doing that right now.
24 You mean as far as punitive damages?

25 MR. BRALY: Yes.

1 THE COURT: Okay. Well, I would still like
2 to do that. It is going to take me quite a while to
3 do it. I may have to go a little bit longer next
4 week, but I think it would be a better way to do it.

5 MR. BRALY: Well, maybe we can let the jury
6 off early tomorrow afternoon. It is Friday.

7 THE COURT: Anything else?

8 MR. BRALY: Judge, I have --

9 MR. JENNINGS: No, Your Honor.

10 MR. BRALY: -- a couple of housekeeping
11 matters. I would like to approach the bench on this
12 one.

13 THE COURT: All right.

14 (The following proceedings were had AT THE SIDE
15 BAR.)

16 MR. BRALY: Mrs. Marsee is quite concerned
17 about the medical records of Conly because they
18 contain --

19 THE COURT: Of who?

20 MR. BRALY: Of Conly, her husband. They
21 contain references to psychological and mental
22 conditions that the man suffered. I wonder if we
23 could get an order of the Court to keep those under
24 the same kind of protective situation that the
25 tobacco company has sought for its own internal

1 documents. I think there are things in there that
2 the young children don't know about.

3 MR. JENNINGS: They haven't been filed.

4 MR. BRALY: Pardon?

5 MR. JENNINGS: They haven't been filed.

6 MR. BRALY: I know they haven't, but they
7 are in your company's possession.

8 THE COURT: Do you have any objections to
9 keeping those confidential?

10 MR. JENNINGS: No, absolutely none, Your
11 Honor.

12 THE COURT: All right.

13 MR. BRALY: Just a minute. A couple other
14 things. In ruling in open court on our motions in
15 limine, we looked at the transcript the other day and
16 the Court did not specifically take up the collateral
17 source information with respect to other payments on
18 the medical bills.

19 THE COURT: My memory was that they agreed
20 that those were not admissible.

21 MR. JENNINGS: I have never -- I assume
22 Oklahoma has got a collateral source rule, haven't
23 they?

24 MR. BRALY: They do. It just never did get
25 taken up. We have that produced in an order and here

1 is a copy of it. I present it to the Court for
2 signature.

3 THE COURT: I was thinking in the response
4 they even responded that they had no contention in
5 that regard, but maybe not.

6 MR. FINNEGAN: I thought that's what we had
7 responded.

8 MR. BRALY: Our problem, the additional
9 problem was that their response varied from the
10 position of the Court the other day on the issue of
11 marijuana, and the Court, as I understand it, the
12 marijuana issue would not be brought up.

13 THE COURT: I believe also they said they
14 had no intention of bringing that up.

15 MR. BRALY: That's true, but that is not
16 what was in their response.

17 MR. FINNEGAN: I think our response did not
18 concede the marijuana point, Your Honor. It conceded
19 the agent orange and it conceded several of the other
20 things, but we did not in our papers concede the
21 marijuana, although I thought at the time that we
22 had, frankly. When I went back and checked --

23 MR. JENNINGS: But we do.

24 THE COURT: But you do?

25 MR. FINNEGAN: But we do.

1 MR. BRALY: I have an order prepared to that
2 effect. I am not sure that it is in that, Judge.

3 THE COURT: Was there a juvenile conviction?

4 MR. BRALY: Yes, there is also a juvenile
5 conviction.

6 THE COURT: What is your position on that?

7 MR. JENNINGS: We are not going to bring
8 that out, Your Honor.

9 MR. FINNEGAN: We are not going to bring
10 that out.

11 THE COURT: What were those numbers that we
12 had lost?

13 THE CLERK: I had found one. Right before
14 the break you said something about 196, 197 and 198.

15 MR. BRALY: He handed those documents to me.

16 THE CLERK: 198 has been admitted
17 yesterday.

18 MR. BRALY: Yes.

19 THE CLERK: So that is out. 179 was a
20 chart. It was Deposition Exhibit 24-A.

21 THE COURT: 179?

22 THE CLERK: Yes.

23 THE COURT: I have got 179. I show it
24 admitted.

25 THE CLERK: Okay. I don't. You do?

1 THE COURT: Yes.

2 MR. FINNEGAN: What is 179?

3 THE CLERK: It is a chart.

4 MR. BRALY: It is this one right
5 here (indicating).

6 MR. JENNINGS: Is that 179? Okay. That's
7 179.

8 THE CLERK: All right. This comes in. This
9 the jury saw. This is 177, but I don't show it ever
10 admitted, but the jury saw it.

11 MR. FINNEGAN: I don't think that he ever
12 moved it. Did you move its admission, Mr. Braly?

13 MR. BRALY: Yes.

14 THE CLERK: 177.

15 MR. BRALY: The judge said he would admit it
16 when we were going through the deposition, line by
17 line.

18 THE COURT: I thought that was 23-F.

19 THE CLERK: That's the deposition is 23-F.
20 It was Trial Exhibit 177.

21 THE COURT: Okay. We will show Exhibit 177
22 admitted.

23 THE CLERK: Today?

24 THE COURT: That's fine.

25 MR. BRALY: Yes, the jury saw it.

1 THE COURT: What is the other one?

2 THE CLERK: 197.

3 (An off-the-record side bar conference was here
4 had.)

5 (The court was recessed until 9:30 a.m., Friday,
6 June 6, 1986.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25